(2) Supreme Court, U.S.
FILED
07-234 AUG 21 2007
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

NED B. MAJORS,

Petitioner,

v.

SOUTH CAROLINA SECURITIES COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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August 21, 2007

TABLE OF CONTENTS

Page

Appendix A – Opinion of South Carolina's Supreme Court filed April 23, 2007 ..... 1a

Appendix B – Administrative Hearing Officer's *Report and Recommendation* issued January 13, 2004 ..... 18a
w/attached Petitioner's "Agency Contract" as Exhibit A 57a

Appendix C – South Carolina's Supreme Court Order Denying Petitioner's Rehearing Request filed May 23, 2007 ..... 63a

Appendix D – Respondent's "Final Order to Cease and Desist Selling Unregistered Securities" issued on February 11, 2004 ..... 65a

Appendix E – Respondent's (First) "Order to Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud, and Notice of Right to a Hearing" issued on September 9, 2003 ..... 89a

Appendix F – Horry County Circuit Court Judge James E. Lockemy's Order of October 27, 2004 ..... 101a

Appendix G – Administrative Hearing Officer's November 4, 2003 Letter informing parties of his *ex parte*, private, meeting with Respondent's Commissioner 106a

Appendix H – Text of South Carolina Code of Law 1976 §35-1-1480 ..... 108a

Appendix I – Text of South Carolina Code of Law 1976 §35-1-330 ..... 109a

Page

Appendix J – Text of South Carolina Appellate Court Rule (SCACR), Professional Conduct, Rule 3.5(a) and (b) of Rule 407, and related "Comments" 111a

Appendix K – Excerpts from Judge Lockemy's September 7, 2004 Hearing 112a

Appendix L – The State of Georgia Securities Division's Opinion letter 116a

APPENDIX A

[Filed April 23, 2007]

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ned B. Majors and Tax Lien Agents, Inc.,

Appellants,

v.

South Carolina Securities Commission,

Respondent.

Appeal From Horry County
James E. Lockemy, Circuit Court Judge

Opinion No. 26317
Heard November 14, 2006 – Filed April 23, 2007

AFFIRMED

John F. Beach and John J. Pringle, Jr., both of Ellis, Lawhorne & Sims, of Columbia, and Ned Majors, of Myrtle Beach, for Appellant.

Scott E. Hultstrand and Tracy A. Meyers, both of Office of the Attorney General, of Columbia, for Respondent.

JUSTICE WALLER: We certified this case from the Court of Appeals pursuant to Rule 204 (b), SCACR. The South Carolina Securities Exchange Commission ordered Appellants, Ned Majors and Tax Lien Agents, Inc. (collectively TLA), to "Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud." TLA appeals, contending it is not engaged in the sale of "securities." We disagree and therefore affirm.

FACTUAL BACKGROUND

Ned Majors is President and sole shareholder of TLA, a South Carolina Corporation operating in Myrtle Beach since 1998. TLA's business centers around the purchase of tax lien certificates (TLCs) at city and county tax lien auctions throughout the country. Pursuant to TLA's "Agency Contract," TLA is the purchasing agent for its Principals. TLA Agents make all purchasing decisions, and they bid competitively for purchases at auctions by offering to accept a lower interest rate than the statutory rate to which purchasers would otherwise be entitled. Pursuant to the contract, the Agency bids on tax liens which TLA believes have a reasonable prospect of not being redeemed. The Principal agrees to pay Agent a "non-refundable agency fee" (between 12-25% of the principal's initial tax lien purchase amount) and grants TLA an inchoate interest of 50% ownership in any unredeemed TLCs.

For each TLC purchased on a principal's behalf, the principal gives the Agent a cashiers check (or a Trust directive if using a trust) made payable to the "County Treasurer for Tax Liens." The TLCs purchased are listed in the principal's name. If a TLC is redeemed before its maturity date (usually 1-3 years), the Prin-

cipal keeps all redemption monies, including interest and penalties; however, if the TLC is not redeemed, the Principal agrees to immediately sign papers to assign, convey and register the property, and to confirm the Agent has a 50% ownership interest in the net profit of the TLC and any resultant deed issued. The Principal is required (unless agreed upon with the Agent) to commence good faith efforts to quiet the title and sell the property. Although Principals have the right to select closing attorneys and quiet title, etc., they very seldom do so as the majority are absentee owners living a considerable distance from the properties; the majority use TLA's services to facilitate both the sale and quieting title. Although TLA represents only one principal for each TLC purchased, an agent represents 15-20 principals (also referred to as "employers") at each tax sale or as many as 200 "employers" over a two week period.

If a Principal wishes to sell TLCs, the Agent has first right of refusal, and if the TLC is sold to any other party, the third party must agree to the same contract terms as the Principal. If either party elects, the underlying property which was not redeemed may be purchased by paying 50% of the average of three apprisals. The agency contract also stated that "while there are no risks in owning government sold and issued TLCs that are redeemed (paid off), there are potential down side financial risks if a TLC matures into a property deed as the underlying property market value could substantially drop during the tax lien maturity period."

PROCEDURAL BACKGROUND

In September 2003, the Attorney General, acting as the South Carolina Securities Exchange Commissioner (Commissioner), entered an order for Majors and TLA to "Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud" and gave them notice of a right to a hearing. The Commissioner appointed G. Marcus Knight as the Administrative Hearing Officer for the matter, and a public hearing was held on Oct 30-31, 2003. Thereafter, Knight issued a detailed report and recommendation concluding that 1) the South Carolina Uniform Securities Act (the Act) applied because TLA was engaged in the sale of "securities" as defined in that Act, S.C. Code Ann. § 35-1-20 (15) because its contract constituted an "investment contract." The Hearing Officer also rejected TLA and Majors' contention that the manner of issuance of the cease and desist order deprived them of due process, or that their due process rights were violated by his appointment as Hearing Officer. The Hearing Officer concluded that the Commissioner should order a final Cease and Desist Order, pursuant to S.C. Code Ann. § 35-1-60, due to a violation of the registration requirements § 35-1-810 of the Act. However, the Commissioner opined the Final Order should exclude any reference to TLA making "material misrepresentations and/or omissions" in connection with its sale of TLCs, and should not pursue any criminal or civil penalties.

In February 2004, the Commissioner issued a "Final Order to Cease and Desist Selling Unregistered Securities." The Commissioner found TLA's investment opportunity constituted a "security" under the Act and also found a violation of the registration requirements § 35-1-810. TLA and Majors were ordered to cease and desist

from offering or selling the TLC investment opportunity in or from the State of South Carolina. The final order did not find TLA was engaged in securities fraud.

Majors and TLA appealed to the circuit court which ruled 1) the investment opportunity offered was a security, 2) the SEC Commission had authority to issue the original cease and desist order, and 3) Majors and TLA were afforded due process in the underlying administrative proceeding.

ISSUES

1. What is the proper standard of review?
2. Did the SEC have authority to issue the initial cease and desist order?
3. Were Appellants afforded due process in the underlying administrative proceeding?
4. Were Appellants properly ordered to cease and desist from the sale of unregistered securities in violation of the S.C. Uniform Securities Act?

1. STANDARD OF REVIEW

The issue in this case involves a decision of whether TLA's sale of TLCs constitutes the sale of securities. We find this is a novel question of law, such that we are free to decide the issue with no particular deference to the lower court. *Baggerly v. CSX Transp. Inc.*, 370 S.C. 362, 635 S.E.2d 97 (2006); *citing I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000).

2. INITIAL CEASE AND DESIST ORDER

TLA asserts the Commissioner had no statutory authority to enter the initial Cease and Desist order, such that

the whole proceeding should be voided for lack of subject matter jurisdiction. We disagree.

This issue is not one of subject matter jurisdiction. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 236, 442 S.E.2d 598, 600 (1994); *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

In any event, S.C. Code Ann. § 35-1-60 (2004 Supp), as it read at the time this matter arose, stated in pertinent part, "The Securities Commissioner may make, amend, and rescind those rules, forms, and orders, including cease and desist orders, as are necessary to carry out the provisions of this chapter. . ." (emphasis supplied).

As originally written, S.C. Code Ann. § 35-1-60 did not allow the Commissioner to issue cease and desist orders. It was amended in 1992 to permit the Commissioner to make, amend, and rescind those rules, forms, and orders, including cease and desist orders. . ." 1992 Act No. 451 § 1, eff. June 15, 1992. We find it was within the Commissioner's authority to issue the initial cease and desist order.[1]

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[1] We note also that, effective Jan. 1, 2006, Chapter 1 of the South Carolina Uniform Securities Act was repealed and replaced with a new Chapter 1, to comport with the Uniform Securities Act promulgated by the National Conference of Commissioners on Uniform State Laws. Section 35-1-60 has been repealed. In its place, §§ 35-1-603 and 35-1-604 now govern civil and administrative enforcement of the Act. Section 35-1-603 permits the Commissioner to maintain a civil action in the court of common please. Section 35-1-604 (Supp 2005) states, in pertinent part, as follows:

> a) If the Securities Commissioner determines that a person has engaged, is engaging, or is about to engage in an act,

[footnote continued]

3. DUE PROCESS

TLA and Majors next assert issuance of the cease and desist order in violated their rights to due process. We disagree.

The initial cease and desist order, prior to a hearing, was permissible. *See Ross v. MUSC,* 328 S.C. 51, 72, 492 S.E.2d 62, 69 (1997) (Article I, § 22, requires an administrative agency provide notice and an opportunity to be heard, but does not require notice and an opportunity to be heard at each level of the administrative process. It mandates notice and opportunity to be heard at some point before the agency makes its final decision).

Moreover, contrary to TLA's contention, we find no due process violation in the SEC Commissioner's role in this matter.

In *Ross v. MUSC,* 328 S.C. 51, 492 S.E.2d 62 (1997), we held the purpose of S.C. Const., Art. I, § 22 is to ensure adjudications are conducted by impartial administrative bodies. Partiality exists where an adjudicator either has ex parte information as a result of prior investigation or has developed, by prior involvement with the case, a "will to win." *Ross,* 328 S.C. at 69, 492 S.E.2d

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practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter, the Securities Commissioner may: (1) issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this chapter. . .

Clearly, the Commissioner has authority to issue cease and desist orders prior to commencement of a civil proceeding.

at 72. In *Ross,* we found no violation of Section 22 where MUSC's president investigated a tenured professor's conduct, terminated the professor, and then testified against him at a committee hearing. We found no due process violation because the president did not later participate as an adjudicator, and he did not improperly consider ex parte information. *Id.* at 70, 492 S.E.2d at 72.[2]

In *Garris v. Governing Board of S.C. Reinsurance Facility,* 333 S.C. 432, 511 S.E.2d 48 (1998), this Court recognized, "the fact that investigative, prosecutorial, and adjudicative functions are performed within the same agency, or even performed by the same persons within an agency, does not, without more, constitute a violation of due process." 333 S.C. 443, 511 S.E.2d at 54. In that case, Garris was a designated insurance agent for the South Carolina Reinsurance Facility. The Facility began investigating Garris, alleging irregularities in his underwriting practices. After a hearing, the Governing Board of the Facility voted to revoke Garris' status as a designated agent. Garris appealed, contesting the composition of the Board which revoked his designation. In Garris, the five Governing board members and one nonmember of the South Carolina Reinsurance Facility attended one or more committee meetings at which Garris' case was discussed extensively in open and executive sessions, and all six voted to revoke Garris' status as a designated agent. Of those six, four were members of the committees which considered the Garris matter.

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[2]However, we did find a violation of Section 22 where the university vice-president investigated the professor's case, testified as an adverse witness at a committee hearing, and sat as the intermediate judge in a three-stop disciplinary procedure. *Id.*

Further, two other Governing Board members attended committee meetings and the hearing, but did not vote. We concluded the procedure violated due process, stating:

> we conclude that Governing Board members who participate in the investigation or prosecution of a designated agent as a membr or observer at a committee meeting may not participate as adjudicators of that agent's case at a subsequent hearing. Members who participate in the investigation or prosecution of a case must distance themselves from the adjudicatory process, and should refrain from even discussing that case with future adjudicators.

333 S.C. at 446, 511 S.E.2d at 55.

Garris and *Ross* are distinguishable from the present case. Unlike those cases, the Commissioner did, in this instance, appoint a Hearing Officer to take evidence and make a report and recommendation. Further, the Commissioner did not personally participate in the gathering of the evidence before the Hearing Officer, and there is no evidence he discussed the underlying case with the Hearing Officer.

Moreover, we find the power of the SEC Commissioner is akin to this Court's power to issue an order of interim suspension of an attorney, and then, after an investigation by the Commission on Lawyer Conduct and a Report and Recommendation, issue the ultimate sanction. *See Kirven v. Board of Grievances and Discipline*, 271 S.C. 194, 246 S.E.2d 857 (1978) (members of Board of Grievance are officers of this Court commissioned and charged by this Court with the duty of investigating alleged acts of professional misconduct on the part of their fellow members of the bar, and of reporting to this Court the proceedings of their inquiry, their findings and

recommendation); *Matter of Iseman,* 356 S.C. 280, 588 S.E.2d 606 (2003) (Supreme Court holds ultimate authority to sanction attorneys).

We find TLA and Majors have been afforded due process in this matter. The initial cease and desist order provided them with the right to a hearing, which they requested and were afforded by an independent Hearing Officer. Thereafter, they were permitted to appeal the SEC Commissioner's Final Cease and Desist Order, and were allowed to post a bond to stay enforcement of that order pending appeal. The order has further been stayed by this appeal.

4. SECURITY

Finally, TLA asserts that its sale of TLCs does not involve the sale of a security, and it is therefore not in violation of the Act, because it was not required to register under S.C. Code Ann. § 35-1-810 (1987) (making it unlawful to sell any security in this state unless it is either registered or exempt). We disagree. The Commissioner and the circuit court properly held the sale of TLCs in this case constituted the sale of "securities" within the meaning of the Act.

S.C. Code Ann. § 35-1-20 (12), as it read at time of the cease and desist order, defined a "security" as, inter alia, "any certificate of interest or participation in any . . . investment contract . . . or, in general, any interest or instrument commonly known as a security . . ."

As noted by the Court of Appeals in *Garrett v. Snedigar,* 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987), *overruled on other grounds, Olson v. Faculty House of Carolina, Inc.,* 354 S.C. 161, 580 S.E.2d 440 (2003), "in construing the state Act, [the Court] may

look for guidance to cases construing its federal counterpart." In *Garrett*, the Court of Appeals recognized that both our Act and the Federal Act define the word "security" to include any "certificate of interest or participation in any profit-sharing agreement, [or] investment contract." The Court of Appeals cited the seminal United States Supreme Court case of *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293, *reh'g denied*, 329 U.S. 819 (1946) in which the Court defined an investment contract as a "transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *Id.* at 298-299.

Under the *Howey* test, an investment contract exists where there has been (i) an investment of money, (ii) in a common enterprise, (iii) with an expectation of profits garnered solely from the efforts of others. *See Teague v. Bakker*, 35 F.3d 978, 986 (4th Cir. 1994). The test is a flexible one, "capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Howey*, 328 U.S. at 299.

We find the Commissioner and the circuit court properly found TLA's sale of TLCs constitutes the sale of an "investment contract," such that under § 35-1-20 (12), it constitutes a security and therefore TLA and Majors were properly ordered to cease and desist from the sale absent proper registration with the SEC Commission.

a. Investment of Money

An "investment of money" under *Howey* means the investor must have committed his assets to the enterprise

in such a manner as to subject himself to financial loss. *SEC v. Pinckney,* 923 F. Supp. 76, 80 (E.D. NC 1996).

It is indisputable that Principals meet this test. They paid an up-front, non-refundable agency fee of 12-25% of their TLC purchase price, they paid all fees and expenses associated with the purchase of the TLCs, as well as the expenses associated with establishing clear title to those properties which were not redeemed, and agreed to pay TLA 50% of the profits from the sale of any properties which were not redeemed. It cannot seriously be argued that Principals here did not make an investment of money.

TLA also asserts Principals were not subject to financial loss. However, its contract specifically states that, "while there are no risks in owning government sold and issued TLCs that are redeemed (paid off), there are potential down side financial risks if a TLC matures into a property deed as the underlying property market value could substantially drop during the tax lien maturity period." Accordingly, we find the first prong of *Howey* is met inasmuch as there is an "investment of money."

b. Common Enterprise Test

TLA next contends the Commissioner, and the circuit court, erred in applying a "strict vertical commonality" test to determine whether it is engaged in a common enterprise. We disagree.

In order to meet the "common enterprise" prong of the *Howey* test, courts around the country have struggled with discerning whether vertical or horizontal commonality, or both, must exist. *See Top of Iowa Cooperative v. Schewe,* 6 F.Supp.2d 843, 852 (N.D. Iowa

1998) (noting that the Eighth Circuit had not ruled on whether either vertical or horizontal commonality or both are required under the "common enterprise" prong of *Howey*, such that the court examined the contracts for either kind of commonality); *see also S.E.C. v. SG Ltd.*, 265 F.3d 42, 49 (1st Cir. 2001) (citing and discussing the different standards in courts across the country); *S.E.C. v. Pinckney*, 923 F.Supp. 76, 81 (E.D.N.C. 1996) (same). As a general guide, vertical commonality requires only a pooling of the interests of the developer or promoter and each individual investor, while "horizontal commonality" requires as well a pooling of interests among the investors. *Schewe*, 6 F.Supp.2d at 852 (citing *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016, 1017-18 (7th Cir. 1994)). *See also SEC v. Alpha Telcom, Inc.*, 187 F.Supp.2d 1250 (9th Cir. 2002) (holding the second element of the *Howey* test can be satisfied by the existence of either vertical commonality or horizontal commonality. Vertical commonality is the dependence of the investors' fortunes on the success or expertise of the promoter. Horizontal commonality is the pooling of investor funds and interests. *Citing Brodt v. Bache & Co., Inc.*, 595 F.2d 459, 460 (9th Cir. 1978).)

The courts have further identified two kinds of vertical commonality: broad vertical commonality and strict vertical commonality. To establish "broad vertical commonality," the fortunes of the investors need be linked only to the efforts of the promoter. *See Long v. Shultz Cattle Co., Inc.*, 881 F.2d 129, 140-41 (5th Cir. 1989). "Strict vertical commonality" requires the fortunes of investors be tied to the fortunes of the promoter. *Brodt v. Bache & Co.*

TLA asserts the only proper test is horizontal commonality which, by its nature, requires a pooling of interest among investors. We disagree.

Initially, we note that many courts have applied an "either/or" test of vertical and horizontal commonality such that there is a common enterprise if either test is met. *See e.g. Integrated Research Svcs. v. Illinois Sec. of State,* 765 F.E.2d 130 (Ill. 2002); *SEC v. Parkersburg Wireless LLC,* 991 F.Supp. 6 (D. Col. 1997); *Securities and Exchange Commission v. R.G. Reynolds Enterprises, Inc.,* 952 F.2d 1125 (9th Cir. 1991).

We find the newly revised Uniform Securities Act lend guidance to resolutionof this issue. The comments to S.C. Code Ann. § 35-1-102 (29)(D) state, in pertinent part:

> The courts have divided over the interpretation of the "common enterprise" element of an investment contract. The courts generally recognize that "horizontal" commonality (for example, the pooling of an investment by two or more investors) is a common enterprise. A small minority of the federal circuits will also find a common enterprise in a "vertical" relationship when a single investor is dependent upon the expertise of a single commodities broker. Since two or more persons do not share in the profitability of an undertaking, it is difficult to argue that there is a common enterprise. Section 102(29)(D) follows a significantly larger number of federal circuits and adopts a more restrictive form of vertical commonality that occurs only when there is profit sharing between two persons even if, for example, one is a conventional investor and one is a promoter. *See generally* 2 Louis Loss & Joel Seligman, *Securities Regulation* 989-997 (3d ed. Rev. 1999). In interpreting all elements of the

> investment contract, the courts have emphasized substance, not form.

Clearly, it sppears the Legislature intends a strict vertical commonality test to apply. Accordingly, we find the trial court and Commissioner applied the proper test.

TLA and Majors also assert that, even under a strict vertical commonality test, the Commissioner erred in finding a common enterprise because the relationship here is precisely the opposite of that found in cases of strict vertical commonality. It contends for such a relationship to exist, there must be a showing that the investors' profits are dependent upon the promoter's profits whereas, here, TLA's profits are dependent upon the profits of the principals. We disagree.

The court in *SEC v. TLC Investments,* 179 F.Supp. 2d 1149, 1156 (D. CA. 2001), specifically rejected such a claim, holding that "TLC's fortunes were inextricably linked to the fortunes of the individual investors. So long as the promoter's gain is contingent on the investor's gain, there is a common enterprise."

c. Efforts of others

Lastly, TLA asserts that because its Principals have input into purchasing and sales decisions, they do not have "an expectation of profits garnered solely from the efforts of others." We disagree.

As noted by the Court of Appeals in *Garrett,* the third prong of *Howey* has been relaxed. In *Garrett,* the Court of Appeals held:

> Later cases have eliminated the requirement that one must expect profits solely from the efforts of others in order for an interest to be a security. *See United Housing Foundation, Inc. v. Forman,* 421

U.S. 837, 852, *reh'g denied,* 423 U.S. 884 (1975) (the touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others); *O'Quinn v. Beach Associates,* 272 S.C. 95, 105, 249 S.E.2d 734, 739 (1978) (investment contracts may be found where the investor has duties that are nominal and insignificant or where the investor lacks any real control over the operation of the enterprise).

The key determination is whether the promoters' efforts, not that of the investors, form the "essential managerial efforts which affect the failure or success of the enterprise. *Unique Financial Concepts,* 196 F.3d at 1201 (*citing SEC v. Glenn W. Turner Enterprises, Inc.,* 474 F.2d 476, 482 (9th Cir. 1973)). *See also SEC v. Rubera,* 350 F.3d 1084 (9th Cir. 2003) (test is whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise).

We find the test is met here. As noted in the Commission's order, although TLA's Principals retained some contractual rights of control, in practice their control was very limited. TLA made all of the purchasing decisions, and exercised the majority of control in issues relative to clearing title, picking closing attorneys, etc., because the majority of its investors lived a considerable distance away. As further noted in the Commissioner's order, TLA's marmeting material indicated "we do all the work."

CONCLUSION

In summary, we hold the SEC Commissioner has authority to issue initial cease and desist orders prior to a hearing, so long as a hearing is thereafter afforded. Further, we find the procedure utilized here did not violate TLA's due process rights, and that the final cease and desist order was properly issued because TLA's sale of tax lien certificates was properly found to be the sale of "securities" within the meaning of the S.C. Uniform Securities Act. Accordingly, the order on appeal is

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

APPENDIX B

[Filed January 13, 2004]

STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
SECURITIES SECTION

IN THE MATTER OF
Ned B. Majors and Tax Liens Agents, Inc.
Respondents

Case No. 03010

ADMINISTRATIVE PROCEEDING

REPORT AND RECOMMENDATION OF HEARING OFFICER TO THE SOUTH CAROLINA SECURITIES COMMISSIONER

This matter arises from the issuance by the South Carolina Securities Commission (the "Commission") of its Order to Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud, and Notice of Right to a Hearing (the "C&D Order") to Ned B. Majors ("Majors") and Tax Lien Agents, Inc. ("TLA"), on September 9, 2003. The parties then apparently engaged in litigation before the Circuit Court for the State of South Carolina, the subject of which is not presently germane to the issues brought before the administrative hearing officer in this matter. Respondents apparently made timely request for a hearing in this matter to review the issuance of the C&D Order and to determine whether a

final order should be issued. On October 23, 2003, the South Carolina Attorney General, acting in his statutory capacity as the State's Securities Commissioner, appointed G. Marcus Knight as the administrative hearing officer for this matter pursuant to Section 35-1-1450 of the South Carolina Uniform Securities Act (the "Act") and delegated to the hearing officer such authority as is necessary to conduct the hearing and render this Report and Recommendation. A public hearing on this matter was conducted on October 30-31, 2003 pursuant to Section 35-1-90 of the Act. Subsequent to the conclusion of the hearing, the parties submitted briefs and reply briefs, which were received by the hearing officer not later than December 5, 2003. A transcript of the hearing, together with all exhibits submitted during the hearing and briefs submitted after the hearing, will be delivered to the Securities Commissioner by the hearing officer simultaneoulsy with delivery of this Report and Recommendation.

FACTUAL BACKGROUND

TLA is a South Carolina corporation organized by filing of its Articles of Incorporation with the South Caroline Secretary of State on November 19, 1998. TLA commenced its business during 1999 and has, from the inception, operated its business principally from Myrtle Beach, South Carolina. Majors is a resident of South Carolina and is the sole shareholder and officer of TLA.

The primary business activity of TLA centers around the bidding and purchasing of tax lien certificates ("TLCs") at tax lien auctions or sales conducted by the taxing authorities of city and county governments throughout approximately 26 states in the United States.

Purchasers of TLCs bid competitively for their purchase at auctions conducted by the governmental entity by offering to accept a lower interest rate than the statutorily prescribed rate to which the issuing governmental entity is entitled. TLSs generally mature under the applicable states' laws in periods of one to three years. Each of the unmatured TLCs may be redeemed by the owner of the underlying property by paying the past due taxes, plus penalties and interest at statutorily prescribed rates, to the issuing governmental entity, which in turn pays the amount of the TLCs' purchase price plus the bid interest rate to the holder of the TLCs. Each of the matured TLCs which are not redeemed create for the holder of the TLCs the right to obtain a tax deed or similar instrument of conveyance for the underlying property. The TLCs holder must often undertake legal action to quiet or clear his title to underlying property of any other liens or encumbrances on the title which are junior to the tax lien by which the holder of the TLCs obtains title. According to Majors' testimony, all or virtually all other liens on the underlying property, including bank mortgages and federal tax liens, are junior to the interest of the holder of the TLCs, and accordingly can be extinguished in the process of quieting title. The stated objectives of the investment in TLCs is to either (x) receive a return of the original purchase price for the TLCs plus payment of interest and penalties from the redemption of unmatured TLCs by the underlying property owner, or (y) obtain marketable title to and sell at a significant profit the property underlying matured TLCs.

In conducting this enterprise, TLA serves as a contract agent for investors (the "Principals") who furnish the funds required to purchase the TLCs. Most of the Principals appear to be individual investors or trusts con-

trolled by individual investors. Many of these Principals appear to be South Carolina residents or to have been present in South Carolina when solicited by TLA. TLA solicotrs Principals pursuant to newspaper advertisements, booths at conventions and expositions, a website, seminars, and tapes, among other methods. TLA has published advertisements in newspapers in South Carolina and conducted seminars and sponsored booths at conventions and expositions in South Carolina in recent years. Majors' testimony and the other evidence presented at the hearing requires the deduction that TLA made offers and sales of TLCs to considerably more than 25 persons during the twelve-month period preceding September 9, 2003 in or from the State of South Carolina. The relationship between the Principals and TLA is governed by a standard form Agency Contract, substantially in the form attached to this Report and Recommendation as *Exhibit A*.

In its advertising, video tapes, and other promotional materials, TLA claimed, among other things, that: "We eliminate all the risk. We do all the work. We never touch your money." Transcript of Hearing, p. 149, lines 5-6. TLA also claimed in its promotional materials that "every investment check . . . [the Principal] make[s] will be made directly to the government selling the tax lien. . . . All tax liens will be purchased and recorded by the government in your name and address only . . . Ned Majors, our founder, is the recognized authority on real estate tax liens. He wrote the book. . . . We can only make a profit when you receive a property deed and sell it for more than your total cost. . . . We do all the work. . . . And . . . we never touch your money." Tr. p. 146, l. 21 – p. 147, l. 9. TLA advertises that Principals can expect a "government guaranteed eight to

twenty-five percent . . . annual interest" return on redeemed TLCs and an "expectation of a potential yield of 10,000 percent" on the sale of the property underlying matured TLCs. Tr., p. 57, ll. 8-11. In its promotional materials, TLA claims that "our growth expectation is not speculative. We don't have any speculation in our business." Tr. p. 96, ll. 23-25. In TLA's promotional materials, Majors also emphasizes the importance of TLA's experience, connections, and volume leverage in connection with selecting, negotiating, and engaging attorneys to quiet title to, and real estate brokers to market and sell, the properties underlying matured TLCs. *See e.g.*, Tr. at p. 109, l. 22 – p. 113, l. 5. Majors testified that these promotional materials were sent to prospective Principals from TLA's offices at Myrtle Beach, South Carolina, and were given to prospective Principals at seminars and expositions conducted in Myrtle Beach and Charleston, South Carolina, and other locations in various states.

In the Agency Contract, each of the Principals appoints TLA as its agent to bid on and purchase TLCs in the Principal's name or in the name of a trust designated by the Principal. The funding mechanism for purchase of TLCs under the Agency Contract requires the Principal to provide TLA with cashier's checks from an FDIC insured bank payable to "County Treasurer for Tax Liens". The Agency Contract also states that the TLCs will be "listed" in Principal's name . . . by the issuing governmental entity . . . with Principal's address . . . as the official notification address. The Agency Contract, further states that if the amounts of the cashiers checks provided by the Principal for purposes of purchasing TLCs exceeds the actual cost of the TLCs purchased by

TLA on behalf of the Principal, then the excess will be refunded by the governmental entity to the Principal. Under the Agency Contract, the Principal will be entitled to all interest and penalties paid in connection with any redemption of TLCs by an underlying property owner prior to maturity of the TLC. In the event of a redemption of one of the TLCs, the Agency Contract provides that TLA will continue to reinvest the redemption proceeds, at no additional charge for an agency fee, until the Principal either receives a matured TLC (or tax deed) or a period of 36 months expires. In return for TLA's services under the Agency Contract, the Principal agrees to pay TLA a "non-refundable agency fee" (usually in the range of several hundred dollars) and grants an "inchoate interest of 50% ownership" in any TLCs purchased by agent for the Principal which are not redeemed by the underlying property owners within the statutorily prescribed time, and as a result of which "go to deed". Under the Agency Contract, the Principal is obligated to convey the 50% interest "in the net profit of the TLC and in any resultant tax deed" to TLA and the Principal must "promptly thereafter commence good faith efforts to quiet the title and sell" the property underlying the matured TLCs. At the Principal's request, TLA is obligated to engage legal counsel and real estate brokers and "such other professionals as . . . [TLA] deems advisable" to complete the process of selling the property underlying matured TLCs. Upon the sale of the underlying property, the closing agent is directed by the terms of the Agency Contract to first reimburse the Principal for its TLC purchase price and the direct out-of-pocket costs, second reimburse TLA for its direct out-of-pocket costs paid on the Principal's behalf in connection with the marketing and sale of the

underlying property, and third divide equally between the Principal and TLA any remaining net proceeds of the sale. The Agency Contract also grants to TLA a right of first refusal should the Principal decide to sell the TLCs or the underlying property, and requires the Principal to purchase TLA's 50% interest at 50% of the appraised value of the property underlying the matured TLCs if the Principal desires to keep the property. *See* Tr. at p. 298, ll. 15-25. The Agency Contract contains an acknowledgement by the Principal that "while there are no risks in owning government sold and issued TLC(s) that are redeemed (paid off), there are potential downside financial risks if a TLC matures into a property deed as the underlying property market value could substantially drop during the tax lien maturity period". See *Exhibit A* attached hereto.

Accordingly to the testimony at the hearing, TLA usually conducts it's business relationship with the Principals in substantial conformity to the Agency Contract, with a few notable exceptions. In a number of cases, the governmental entity conducting the tax lien sale would not accept checks that were not in the exact amount of the bid for the TLCs. In these situations, TLA deposited the checks in the IOLTA attorney trust account maintained by Majors. Majors testified that in each instance the Principals were notified of the need for this deviation from the standard procedure and the Principals granted permission for the deposit of the checks into Majors' attorney trust account. Majors then wrote checks to the governmental entity in the exact amount of the bid price for the TLCs and sent refunds of the balance of each deposit to the Principals from his attorney trust account. Majors testified, and provided his bookkeeping evidence to support, that he maintained

individual accounting records for each Principal whose funds were deposited into his attorney trust account, and that while there might have been approximately 400 checks from Principals handled this way, these checks constitute a very small percentage of TLA's overall TLC business. Majors also testified that in some instances, by mistake, the governmental entity has issued TLCs or sent redemption payments to TLA, and that in some instances in the past TLA's address has been used as the notice address for the TLCs purchased on behalf of Principals who were traveling or had other reasons for not using their own addresses.

Majors testified that while the Agency Contract grants the Principals the legal right to specify certain criteria governing the purchase of TLCs and to select the attorneys, real estate agents, and other professionals necessary to clear title and sell the property underlying matured TLCs, that he discourages the exercise of such rights (Tr. p. 296, ll. 18-22), and that such rights are rarely exercised by the Principals. In addition, in his promotional video Majors stated that "I can' tell you right now where your money – which auction you're going to go to or which county, but we know a county treasurer in every county of all 2,642 counties who sell tax liens." Tr. p. 102, ll. 17-22. Majors confirmed that most of his Principals live a considerable distance from the properties to which their TLCs apply and that they rarely exercise their rights to select professionals needed to clear title and sell the underlying properties. Tr. p. 299, l. 23 – p. 300, l. 12.

TLA's promotional video, which appears from the testimony to have been widely distributed to prospective Principals, also establishes an offer of liquidity in

the TLCs purchased by TLA for its Principals. In the video, Majors tells his prospective Principals that "if you go off and buy tax liens [on] your own, there is no liquidity. Because the tax collector's not going to give you your money back. . . . However, with our program, if you hire us as our agent, and you want to sell your tax liens, we'll buy them from you. Or we'll have clients that buy them from you. And usually within a week, you know, we can handle up to about four or $500,000 a week easily. I get that much back on redemptions almost every week. . . . After you buy them, we'll not only buy them back from you, but we'll pay you the eight percent interest a year on your money." Tr. p. 97, ll. 5-23. Majors testified that the main source of funding for TLA's compliance with this offer to purchase the TLCs from Principals was its profits off of its agency fees and its share of the profits when property underlying the matured TLCs are sold. Tr. p. 306, ll. 17-22. In TLA's promotional video, Majors stated that TLA's 50% interest in the underlying properties is "the only place where I make my money." Tr. p. 97, ll. 5-23. The parties stipulated that the video was sent to prospective Principals in South Carolina.

Neither the offers nor the sales of opportunities to invest in TLCs pursuant to TLA's Agency Contract and related services (the "TLC Investment Opportunity") have been registered with the Commission pursuant to Section 35-1-810 *et seq.* of the Act. No claim that the TLC Investment Opportunity satisfied the elements of an exemption from the registration requirements of the Act was made under Sections 35-1-310 or -320 of the Act, nor would the testimony and evidence presented at the hearing tend to support such a claim of an exemption. No claim that the TLC Investment Opportunity

constituted a "federal covered security" was made under Sectiond 35-1-810(c) and -1100 of the Act, nor would the testimony and evidence presented at the hearing tend to support such a claim. TLA and Majors were not registered as broker-dealers or agents under Section 35-1-410 *et seq.* of the Act. No claim was asserted by TLA or Majors that an exemption from the broker-dealer and agent licensing requirements of the Act would apply to them under Section 35-1-15 of the Act, nor would the testimony and evidence presented at the hearing tend to support such a claim.

In their opening statements and post-hearing briefs, the parties agreed that the principal issue in this matter is whether or not the TLC Investment Opportunity constituted a "security" as defined in Section 35-1-20 of the Act[1]. If the TLC Investment Opportunity did not constitute a "security" as defined by the Act, then the Act did not apply, the Commission would not have jurisdiction over this matter, and the C&D Order would be inappropriate. If the TLC Investment Opportunity did constitute a "security" as defined for purposes of the Act, then the Act did apply and this hearing officer must analyze the potential violations of the Act by the Respondents.

APPLICABILITY OF THE ACT

The staff of the Securities Section of the Attorney General's Office (the "Staff"), as the proponent of the C&D Order, asserts that the TLC Investment Opportun-

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[1]The Respondents also have raised a due process question as to the statutory scheme and procedures for issuance and review of the C&D Order by the Commission, which will be addressed below.

ity constituted a "security" for purposes of the Act because it constituted either a (1) "investment contract" or (2) a "certificate of interest or participation in . . . [a] profit-sharing agreement". Section 35-1-20(15) of the Act. Respondents deny that the TLC Investment Opportunity constituted a "security" under either definition.

1. **Investment Contract.** The term "investment contract", as used in the definition of the term "security" for purposes of Section 35-1-20(15) of the Act, has apparently not been defined in any fashion meaningful to this matter by the courts of this State. However, it is well established that the South Carolina courts seek guidance from the federal courts in interpreting provisions of the Act which parallel federal statutes, such as the definition of the term "security". *See Carver v. Blanford,* 288 S.C. 309, 310, 342 S.E.2d 406, 407 (1986); *McGaha v. Moseley,* 283 S.C. 268, 273, 322 S.E.2d 461, 464 (1984); *Bradley v. Hullander,* 272 S.C. 6, 249 S.E.2d 486 (1978). The seminal case for the definition of the term "investment contract" is *SEC v. W. J. Howey Co.,* 328 U.S. 293, 298, 66 S. Ct. 1100, 1102-03 (1946). In *Howey* it is well established that the United States Supreme Court defined an "investment contract" as any arrangement whereby an investor makes (a) an investment of money (b) in a common enterprise (c) with an expectation of profits solely from the efforts of the promoter or a third party. *Teague v. Bakker,* 35 F.3d 978, 986 (4th Cir. 1994), *cert. denied,* 513 U.S. 1153, 115 S.Ct. 1107 (1995) (citing *Howey,* 328 U.S. 299-300, 66 S. Ct. 1103). The South Carolina Court of Appeals has adopted the *Howey* analysis. *Garrett v. Snedigar,* 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987), *rev'd on other grounds*

Olson v. Faculty House of Carolina, Inc., 354 S.C. 1161, 580 S.E.2d 440 (2003).

(a) **Investment of Money.** An "investment of money" means, for purposes of the definition of an "investment contract", that the investor must have committed his assets to the enterprise in such a manner as to subject himself to financial loss. *SEC v. Pinckney*, 923 F. Supp. 76, 80 (E.D.N.C. 1996). In the instant case, the Principals wrote checks to TLA for the non-refundable agency fee and invested money in TLCs purchased by TLA on their behalf. Majors testified, that while he promoted and believed that the TLC Investment Opportunity was a safe investment, the Principals could lose some or all of their investment if the underlying property had at the time of sale a value less than the amount of the investment. The terms of the Agency Contract included a specific acknowledgement by the Principal that this "potential down side financial risk" existed. In addition, the Principals were required to grant TLA a "50% inchoate interest" in each TLC that TLA purchases on behalf of the Principal, which is a further commitment of the Principal's assets to the enterprise. Thus, the first element of the *Howey* test, requiring an "investment of money" is satisfied in the instant case. *Cf. Pinckney*, 923 F.Supp. at 81 (Although the promoter represented that the investor's funds would be under the investor's control, profits would be generated by trading of the financial instruments in which the investment was made. The investor would have been subject to financial loss by virtue of the trades to be made.).

(b) **Common Enterprise.** The *Howey* definition of investment contract requires as a second element that the particular transaction constitute a "common enter-

prise". In this regard, the *Howey* analysis contemplates that the transaction will involve a relationship between investors. The *Howey* case, however, does not define precisely the required nature of the relationship or the required number of investors that must be involved. As a result, the courts have subsequently developed three different tests to determine whether the requisite "common enterprise" element is satisfied: (i) horizontal commonality, (ii) strict vertical commonality and (iii) broad vertical commonality. Morrow K. Monaghan, Note, *An Uncommon State of Confusion: The Common Enterprise of Element of Investment Contract Analysis*, 63 Fordham L. Rev. 2135, 2152 (1995). While the Fourth Circuit Court of Appeals has not yet ruled definitely on the applicable test for this element of the *Howey* analysys, district courts in the Fourth Circuit have recognized both horizontal commonality and strict vertical commonality as applicable. *See e.g., Pinckney*, 923 F. Supp. at 81-82; *see also SEC v. R. G. Reynolds Enter., Inc.*, 952 F.2d 1125, 1130 (9th Cir. 1991). This hearing officer agrees with the cases in the Fourth Circuit recognizing horizontal commonality and strict vertical commonality as appropriate tests, and rejects broad vertical commonality (which would be relatively easy to demonstrate in the instant case) for two reasons: (x) the broad vertical commonality test considers whether the investor's realization of profits is inextricably tied to the promoter's expertise and skill, which overlaps, and renders superfluous, the third element of the *Howey* test, which requires an expectation of profits based on the efforts of the promoter or other third persons (*see Pinckney*, 923 F. Supp. at 81-82; Monaghan at 2161); and (y) the broad vertical commonality test is simply too broad, potentially bringing within the special regulation of the

securities laws a wide variety of contracts and other arrangements between parties that neither require nor comport with the policies and principles underlying the securities laws, which could unduly hinder commerce in the marketplace (*see* Monaghan at 2162). Accordingly, this hearing officer will review the "common enterprise element" of the *Howey* analysis in the instant matter under only the horizontal commonality and strict vertical commonality tests.

(i) *Horizontal Commonality*. The horizontal commonality test, which is derived principally from the facts of the *Howey* case itself, is present when the investments of multiple investors are pooled and the fortunes of one investor are linked to the fortunes of other investors. Specifically, the court will find that horizontal commonality exists where investors' contributions are pooled and the distributions of profits and losses are experienced ratably among the investors as a group. *See* Monaghan at 2152-57; *see also Pinckney*, 923 F. Supp. at 82. Thus, the outcome of the investment for each individual investor is tied both to the success of the enterprise and to the outcome for the other investors in the enterprise. In the instant matter, the testimony and evidence suggest some facts supportive of a finding that horizontal commonality existed:

> First, in a number of situation, where the governmental entity required TLA to deposit the precise amount of the bid for TLCs, the Principals' checks were deposited in a single account, namely Majors' attorney trust account. While these deposits into a single account have certain aspects of a pooling of the funds of multiple investors, Majors did, according to his testimony and evidence, maintain individual accounting of the funds for each Principal.

Second, TLA agents purchased TLCs at each auction on behalf of multiple Principals by using a rotational process, whereby the TLA agent bids for TLCs identified as suitable by TLA first for one Principal and then for each other Principal in order, on a virtually random basis. This random rotational purchasing suggests that the quality of the TLCs purchased on behalf of one Principal is linked to the randomly selected quality of the TLCs purchased on behalf of other Principals at the same auction. However, the testimony and evidence at the hearing suggests that TLCs are always bought for a single Principal at a time, in that Principal's name, and that multiple Principals do not share in the benefits of TLCs purchased for other Principals.

Third, TLA is obligated by the Agency Contract to purchase replacement TLCs for any Principal whose TLCs are redeemed by the underlying property owner prior to maturity of the TLC. For this replacement service, TLA does not charge an additional agency fee, meaning that the benefit of this replacement obligation to the Principal whose TLCs are redeemed prior to maturity is at risk for the continued operational success of TLA, who will have to fund the costs of pursuing replacement TLCs out of its own operational resources, which is necessarily subject to the profitability of the entire enterprise, and thereby linked to the fortunes of the other Principals. However, because of the volume of business and the number of auctions routinely attended by TLA agents, and the relatively nominal amount of the non-refundable agency fee, this risk seems to be minimal.

Fourth, TLA and Majors promote the liquidity of the TLC Investment Opportunity by marketing a standing "offer" to the Principals to purchase TLCs from Principals who wish to dispose of them,

and if TLA or Majors do not purchase such TLCs, TLA and Majors offer to help arrange for another Principal to purchase TLCs. According to the testimony at the hearing, the major source of funding for this liquidity option are the profits derived by TLA from its 50% interest in matured TLCs of other Principals, thereby linking the liquidity alternative for the Principal wishing to dispose of TLCs to the profits of other Principals who have sold, or will sell, matured TLCs. However, this liquidity alternative does not appear to be a contractual obligation in the Agency Contract, and there was no testimony or other evidence presented at the hearing about whether this liquidity alternative was relied upon or material to the Principals in making an investment decision.

Fifth, in TLA's promotional video, Majors admits that he buys the second and third liens which attach to the property underlying the Principal's TLCs for the years intervening between the tax lien sale at which TLA purchases the TLCs for the Principal at the time at which the Principal's TLCs mature. Majors tells his prospective Principals in the video that he buys such subjsequent tax liens for his "financial institutions" because, as Majors says, "I know when you foreclose in three years or sell the property, you're going to pay off my financial institution [on] that lien. . . ." Tr. p. 109, ll. 11-14. These transactions suggest that multiple investors have mutual, linked lien interests in the same underlying properties, and that the proceeds of the sale of such properties are shared or pooled on some basis between multiple investors (i.e., when the underlying property is sold, multiple investors receive shares of the proceeds). However, the evidence is ambiguous as to whom Major's "financial institutions" were, how they were solicited, what

contractual terms applied to them, and precisely how they were related to the Respondents. Nor is it clear in the records whether the "financial institutions" and the first lien Principals shared the potential for profit or loss on a ratable basis. Presumably, the second and third liens are each purchased for distinct "financial institutions" and the Principal acquires no direct interest in such liens. There was also no evidence presented at the hearing as to how many such transactions occurred with Major's "financial institutions" or when they occurred, or whether they involved any South Carolina residents.

Sixth, Majors promotes TLA's services to facilitate IRS Section 1031 tax-free exchanges of properties underlying the matured TLCs among various Principals. These services suggest a horizontal financial linkage among participating Principals who exchange properties with one another through TLA's facilitation. However, these services do not appear to be constrctual obligations of the Agency Contract, and there was no testimony or other evidence presented at the hearing that any Principals actually took advantage of these services, whether these services were relied upon or material to Principals in making an investment decision, or whether such exchanges involved any South Carolina residents.

While the foregoing six aspects of TLA's relationship with its Principals are indicative of horizontal commonality, none of them seem to fall squarely within the commonly recognized view of this test – a pooling of the investment proceeds and a pro rata distribution of profits and losses. These aspects suggest degrees of horizontal (i.e., Principal-to-Principal) economic relationship or dependency, but either the supporting facts are ambig-

uous or incomplete as presented in the hearing or the law is not well-developed as applicable to these aspects. Moreover, since these six aspects of the overall TLA enterprise are more or less on the periphery of the enterprise, and in some instances are exceptions from the normal course of business, a finding in this matter that horizontal commonality existed based on these facets alone would result in a modified C&D Order that simply prohibits a very limited scope of the conduct at question. Thus, reaching conclusions on fine distinctions in these facts would seem to be unproductive and unnecessary, and this hearing officer declines to do so.

(ii) *Strict Vertical Commonality.* In their post-hearing briefs and reply briefs, counsel for both the Staff and the Respondents agreed that the *SEC v. Pinckney*, 923 F. Supp. 76 (E.D.N.C. 1996), enunciated the proper analysis of the strict vertical commonality test. This hearing officer concurs. In *Pinckney*, the Court for the Eastern District of North Carolina held that "a common enterprise may be established by showing that the investor's profits are directly related to the promoter's profits". *Pinckney*, 923 F. Supp. at 82. In reaching this conclusion, the Court concluded that the often more restrictive horizontal commonality test is not the exclusive test for the "common enterprise" element of the *Howey* analysis. To rely exclusively on horizontal commonality would be "overly restrictive and not in keeping with the Act's remedial goal of preventing . . . [violations of the securities laws] in connection with an offer of what would otherwise be a security but for the absence of multiple investors." *Pinckney*, 923 F. Supp. at 82. Exclusive reliance on horizontal commonality would "also make the test easy to evade by a disingenuous promoter who simply maintains separate bank

accounts or who dissipates the investors' contributions immediately". Monaghan at 2157.

In the instant matter, TLA's Agency Contract with its Principals provides expressly for an equal 50/50 sharing between TLA and the Principal of the profits derived from the sale of the property underlying matured TLCs, after the Principal and TLA are each reimbursed their respective out-of-pocket costs. In his testimony, Majors acknowledged that this was the primary motivation for TLA undertaking this enterprise and the only source of profit for TLA, as the relatively nominal non-refundable agency fee did not cover the costs of operations. Thus, the Principals' profits are inceed directly related to TLA's profits and vice versa.

In the expert testimony of Attorney Robert A. Singer offered by the Respondents at the hearing, and in Respondents' post-hearing briefs, Respondents contend that because in the instant situation TLA's revenues are derived from the Principals' profits, that this is the "exact opposite of the relationship required . . . to show strict vertical commonality". Respondents' Brief dated November 26, 2003, p. 17. However, in *Pinckney*, which was a summary judgment case cited in Respondent's Briefs, the court concluded that "evidence . . . that . . . [the promoters'] fortunes would be linked to . . . [the investor's] return on the investment and those fortunes would be derived from a percentage of the [investor's] return" was legally sufficient to establish a factual dispute as to the existence of a common enterprise. *Pinckney*, 923 F. Supp. at 82. In reaching this conclusion, the *Pinckney* court analyze whether an investment in "prime bank instruments" by a individual investor would satisfy the strict vertical commonality test for purposes of

the "common enterprise" element of the *Howey* analysis. In *Pinckney*, the defendants were promoters who would profit only as a result of commissions or a similar payments of a percentage of the return received by the investor. Thus, the *Pinckney* court reached a conclusion that the promoter's profit being linked to the investor's profit has the same impact, for purposes of strict vertical commonality, as the investor's profit being linked to the promoter's profit. In other words, *Pinckney* held that it is legally sufficient that the profit of the investor and the promoter are linked; and it is not determinative for purposes of the strict vertical commonality test whose profits are derivative upon the profits of whom. This is particularly so in the instant matter since TLA has from the beginning of the arrangement a 50% inchoate interest in the profits of the sale of property underlying matured TLCs. Both the Principals and TLA profit from the sale of the property in the same fashion and at the same time, and pursuant to parallel and equal interests. *See Reynolds*, 952 F.2d at 1130-31 ("One indicator of vertical commonality, though by no means the only indicator, is an arrangement to share profits on a percentage basis between the investor and the . . . promoter. . . . In the instant case, [the promoter] . . . told investors he would take a management fee based on a percentage of profits, thus making his own profit contingency on the profit of his investors").

Moreover, that a clever and creative promoter can develop investment vehicles whereby the promoter's profits are derived from the investor's profits, and not vice versa, should not eliminate the application of the securities laws and the availability of the protections of investors intended to be afforded thereby, especially in

light of *Howey's* conclusion that the purposes of the inclusion of the term "investment contract" in the definition of "security" was to provide a flexible term that will achieve the purposes of the securities laws in a variety of changing situations in a dynamic marketplace. Monaghan at 2145 (citing *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S. Ct. 120 (1943)).

This hearing officer concludes, therefore, that "strict vertical commonality" is an appropriate test for the "common enterprise" element of the *Howey* analysis, that the *Pinckney* case analysis is apposite, and that under the *Pinckney* analysis, the facts of the instant matter satisfy the "strict vertical commonality" test for the "common enterprise" element of the *Howey* analysis.

(c) **Expectation of Profits from the Efforts of Others.** The third element of the *Howey* analysis is whether the investor had an expectation of profits "solely" from the efforts of the promoter or third party. Monaghan at 2137. This element of the *Howey* analysis addresses the degree of control by the investor over the profit-making aspects of the transaction. Monaghan at 2149. Over the years since the enunciation of the *Howey* analysis, the courts have not strictly construed the word "solely" from the efforts of others. *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 920 (4th Cir. 1990); *Pinckney*, 923 F. Supp. at 82. The later cases after *Howey* have softened this requirement by interpreting "solely" to mean "largely" or "principally". Monaghan at 2149. This test can still be met if the most essential functions or duties must be performed by others and not the investor. *Bailey*, 904 F.2d at 920; *see also Garrett*, 359 S.E.2d at 285-86. Moreover, the court is not required to look exclusively

at the language of the contract. "Rather, it must consider the economic realities of the situation to determine whether the investor has any real control over the management of his investment." *Waterman v. Alta Verde Indus., Inc.*, 643 F. Supp. 797, 804 (E.D.N.C. 1986); *see also Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003) ("What matters more than the form of an investment scheme is the 'economic reality' that it represents"). *See generally* South Carolina Securities Statement of Policy 95-2 (membership interests in a member-managed limited liability company will constitute securities where the "facts and circumstances render substantially meaningless the managerial powers" of the members despite the rights of control granted to members by statute or the operating agreement).

In the *Waterman* case, the court focused on the promoter's managerial efforts that could cause the investment to increase in value, the manager's special expertise in selecting items within a particular class of items which will appreciate at a faster rate than a particular class in general, and the managerial efforts dealing with the property where an investor is unable or not equipped to do so. In *Waterman,* the investor had a contractual right to manage the feeding and care of the cattle in which the investor invested; however, the court found that the investor could not have invested in a cattle operation except through an operation managed in a fashion such as offered by the promoter. The investor seldom was able to visit the operation and lacked the expertise or time to manage the cattle operation. The court concluded that, in looking at the reality of the situation, the investor did not in fact have any real control over the maintenance of the investment. In reaching this conclusion, the court focused on the promoter's representa-

tions that it would provide a "turn-key package" and its advertisements that it "handles everything" for its investors. *Waterman*, 643 F. Supp. at 805-806. As a result, the *Waterman* court found that this third element of the *Howey* analysis was satisfied despite the contractual right of the investor to determine when to sell the cattle. This conclusion was based on the impracticality of the investor having any real control over the decisions. *Waterman*, 643 F. Supp. at 806; *see also SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1341 (9th Cir. 1994).

In the instant situation, this hearing officer reaches a similar conclusion that the essential functions from which the profit[2] is derived were to be performed by TLA and Majors. The Principals typically have no input into what TLCs are purchased for them. They merely sign the Agency Contract and provide the funds to TLA, relying on TLA to screen the properties, select the TLCs, attend the auction, conduct the bid, and process the paperwork. The selection of TLCs is the essential step in making a profit – TLA touts its expertise in selecting TLCs that will mature to permit a sale of the underlying property for a value greater than the amount of the investment, and the Agency Contract reserves to TLA the essential decision-making authority for the

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[2]It is indisputable that the Principals expect a "profit" from this investment in TLC. All of TLA's promotional materials hype the return on investment that prospective Principals can expect (*see e.g.*, Tr. p. 57, ll. 8-11), and in his testimony, Majors frequently referred to "profits" for investors and TLA from the sale of the properties underlying the TLCs. The only legitimate question, therefore, is whether the Principals were led to expect the profit from the efforts of others or themselves.

selection of TLCs to purchase. TLA discourages (quite successfully, it appears) the Principals from setting criteria for the purchase of TLCs by TLA.

Majors and TLA also promote the TLC Investment Opportunity as one in which the Principals have to do little or nothing, and tout repetitively that "we do all the work". While the Agency Contract technically leaves to the Principal the right to select legal counsel, real estate brokers, and other professionals necessary to quiet the title and sell the property underlying matured TLCs, this right is no more than rarely exercised, according to Majors' testimony. Moreover, the Principals have no realistic ability to control the sale of the property underlying the matured TLCs. Under the Agency Contract, the Principals have an obligation to use their best efforts to sell the property, and if TLA requests, immediately convey to TLA the 50% inchoate interest in the property, or in the alternative they must buy TLA's 50% interest in the property at 50% of its appraised value if the Principals wish to retain the property. The Principals must bear the costs and other burdens of compliance with these obligations, which TLA offers in its marketing materials to expertly supervise and minimize using its experience, connections, and volume leverage. Thus, the obligations imposed on the Principals by the Agency Contract create pressure on the Principals to let TLA "do all the work" to quiet the title and sell the property. The Principals are most often located far from the properties. TLA's marketing program almost ensures that it will most frequently purchase TLCs for Principals who are located nowhere near the location of the Principals. Majors even markets that he does not know, at the time of a seminar when Principals are solicited and contracted, where their money will be invested. The Principals have

virtually no input into the selection, identity, characteristics, or location of the underlying properties at the time the TLCs are purchased for them, and generally have relatively small units of investment in separate properties located in various states, which would not justify travel to, or other long-distance control over, the properties or the sale process.

Given the volume of properties in the overall enterprise, as managed by TLA, and TLA's heavy promotion of its expertise, experience, services, and connections with regard to selecting TLCs and selling the underlying properties in an efficient, fast, and profitable manner, the Principals' technical legal rights to control the sale process appears to be a little more than window-dressing. *See Reynolds*, 952 F.2d at 1133-34 ("While the sales contract gave investors the right to make other arrangements for the refining of their ore, there is no evidence that a single investor exercised that right. Promotional materials for the program did not emphasize investors' legal right to refine the ore themselves but rather . . . [the Promoter's] commitment to build a new refinery at which investor's ore would be processed. Furthermore, since the refining contract was included in the price paid for the ore, investors would have incurred unnecessary costs if they had the ore transported and refined elsewhere."). The mere existence of contractual rights of control granted in the Agency Contract to the Principals is not determinative. *See Robinson*, 349 F.3d at 170 ("Agreements do not annul the securities laws by retaining nominal powers for investors unable to exercise them."). It is unrealistic to anticipate that the Principals would incur the cost and hassle inherent in exercising this right and it is completely consistent with the realities of the overall situation

to conclude that the efforts of TLA and Majors (e.g., the handling of the complicated paperwork for, and expert attendance at, remote auction sales of TLCs in a wide variety of locations throughout 26 states, the selection and purchase of TLCs that are more likely to mature for sale at values greater than the amount of investment, the replacement of redeemed TLCs with new TLCs at no additional charge, the offer and arrangement of liquidity in the Principals' investment in TLCs, the arrangement of Section 1031 exchange opportunities, and the expert selection and negotiation with professionals to efficiently, quickly, and profitably sell the underlying properties) are the "undeniably significant ones, those essential managerial efforts which affect the failure ot success of the enterprise." *SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973), *cert. denied*, 414 U.S. 821, 94 S. Ct. 117 (1973). These services are also the emphasized core of TLA's marketing program. By virtue of the realities of the situation, TLA and Majors have and will perform all of the essential functions of managing the TLC Investment Opportunity, and not the Principals.[3] *See Pinckney*, 923 F. Supp. at 82; *see also Garrett*, 359 S.E.2d at 286.

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[3] As an analogy, Respondent's expert Attorney Singer testified that the contractual and statutory rights of general partners of general partnerships and members of member-managed limited liability companies to control the management of the business entity resulted in these investments not satisfying the *Howey* analysis, meaning these investments were held not to be "securities". However, the case law and statements of policy to which Attorney Singer referred take exception from the indicated results, and subject such investments to the securities laws, where it is impractical or unrealistic that the general partners or members can or will

[footnote continued]

Thus, the TLC Investment Opportunity satisfies all three elements of the *Howey* analysis, meaning that the TLC Investment Opportunity is an "investment contract" for purposes of the definition of "security" under Section 35-1-20(15) of the Act.

2. **Certificate of Interest or Participation in a Profit Sharing Agreement.** Counsel for the Staff also asserts that the TLC Investment Opportunity constitutes a "certificate of interest or participation in a profit-sharing agreement" under Section 35-1-20(15) of the Act. The South Carolina Court of Appeals ruled on the definition of this type of "security" in *McGaha v. Moseley,* 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984). In the *McGaha* case, the investor was granted by written assignment an interest in the profits that arose under a franchise agreement that the promoter had with a third party. The court concluded that on its face, the written assignment of an interest in the profits arising under the franchise agreement constituted a "certificate of interest or participation in a profit-sharing agreement". *McGaha,* 322 S.E.2d at 464.

In the instant case, counsel for the Respondents have asserted through expert testimony of Attorney Singer and the post-hearing briefs that the TLC Investment Opportunity does not constitute a "certificate of interest or participation in a profit sharing agreement" because the Principals do not depend on the profits of TLA for their return. In other words, Respondents assert that the dependency of TLA on the profits to be derived from the sale of the property underlying matured TLCs owned by the Principals is the opposite of what would be required for a "certificate of interest or participation in a profit sharing agreement" for purposes of the definition of "security" under Section 35-1-20(15) of the Act.

While this hearing officer does not find persuasive this analysis as asserted in connection with the "common enterprise" element of the *Howey* analysis by which the term "investment contract" is defined for purposes of the Act, this analysis is useful for purposes of the definition of a "certificate of interest or participation in a profit-sharing agreement". The analysis was inconsistent with the *Pinckney* case for purposes of the definition of "investment contract", but is consistent with the *McGaha* case for purposes of the definition of "certificate of interests or participation in a profit-sharing agreement".

In *McGaha,* the promoter made an assignment to the investor of the promoter's profit rights in the franchise agreement between the promoter and a third party. The court found this assignment to be sufficient to meet the definition of a "security". Moreover, if a mere co-dependency for profits, such as that arising from the equal 50/50 sharing by TLA and the Principals of profits derived from the sale of property underlying the matured TLCs, were to be sufficient for purposes of the definition of "certificate of interests or participation in a profit-sharing agreement", then there would be very little distinction between an "investment contract" and a "certificate of interest or participation in a profit-sharing agreement" for purposes of Section 35-1-20(15) of the Act. We must assume that the legislature intended different things by inclusion of different terms in the definition; hence, a distinction would seem to be appropriate in the definitions of the terms included by the legislature. Moreover, unlike an "investment contract", the term "certificate of interest or participation in a profit-sharing agreement" on its face suggests that the certificate or interest obtained by the investor must be

granted in the profits of someone other than the investor in order for this term to have a sensible meaning. *See McGaha,* 322 S.E.2d at 464. In the instant case, TLA derives its profits from the sale by the Principals of the property underlying the Principal's matured TLC, which is a relationship opposite from the McGaha

which is a relationship opposite from the *McGaha* relationship. In addition, since there is ample support for the conclusion that the TLC Investment Opportunity constituted a "security" for purposes of the Act under the definition of "investment contract" as described above, there is no need to determine whether an expansion on the apparent definition of "certificate of interest or participation in a profit-sharing agreement" enunciated in *McGaha* is appropriate, and this hearing officer declines to do so.

APPLICATION OF THE ACT

The TLC Investment Opportunity offered and sold by TLA, who was controlled by Majors, is an "investment contract" under the definition of "security" in Section 35-1-20(15) of the Act by virtue of application by the *Howey* analysis, satisfying all three of the *Howey* elements: (i) an investment of money under the *Pinckney* case, (ii) in a common enterprise under the strict vertical commonality test set forth in *Pinckney,* (iii) for which the Principals expect profit to be derived from

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be able to exercise effectively such rights of control. *See e.g., Williamson v. Tucker,* 645 F.2d 404 (5th Cir. 1981), *cert. denied,* 454 U.S. 897, 102 S. Ct. 396 (1981); South Carolina Securities Statement of Policy 95-2 ("The analytical pattern usually turns, in essence, upon a qualitative analysis about the meaningful participation of investors in management of the entity".).

the efforts of TLA and Majors under the *Waterman, Reynolds,* and *Garrett* cases. This conclusion is supported by the methods and content of the promotional materials and activity of TLA and Majors, which tout the TLC Investment Opportunity as a lucrative, passive, remote investment, in which TLA and Majors "do all the work". The realities of the overall situation and the nature of TLA's promotional materials override the technical rights of control granted to the Principals in the Agency Contract.

Since the TLCs Investment Opportunity is a "security" under the Act, then the offer and sale of the TLCs Investment Opportunity are subject to regulation of the Act and jurisdiction of the Commission. Respondents have not sustained the burden of proof under Section 35-1-340 of the Act that an exemption from the registration requirements is applicable to the transaction. Moreover, it would appear that no such exemption could be sustained under the facts as presented at the hearing. *See e.g., Waterman,* 643 F. Supp. at 807 ("[P]ublic advertising is incompatible with the claim of a private offering") (quoting *Hill York Corp. v. American Int'l Franchise, Inc.,* 448 F.2d 680, 689 (5th Cir. 1971)). It is undisputed that neither the TLCs Investment Opportunity offered and sold by TLA, nor the promoters of the TLCs Investment Opportunity, have been registered with the Commission under Sections 35-1-810 *et seq.* and -410 *et seq.* of the Act. Thus, TLA, and Majors as its controlling person under Section 35-1-1500, have violated the registration requirements of Sections 35-1-810 *et seq.* of the Act[4] and are subject to enforcement

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[4]The "security" in this matter was the TLC Investment Opportunity embodied in TLA's Agency Contract and related ser-

[footnote continued]

action by the Commission for such violations under Section 35-1-60 of the Act.

Counsel for the Staff introduced testimony and other evidence at the hearing of misrepresentations and omissions by TLA and Majors in connection with the promotion and sale of TLCs Investment Opportunities. Majors stipulated to "puffery". Tr. at p. 248, ll. 23-25. And the testimony and promotional materials introduced into evidence at the hearing included "puffery" that would be inappropriate, and omitted disclosures that would be expected, in a registered securities offering. It is clear that TLA's promotional materials would

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vices. Thus, TLA is the "issuer" of the security under Section 35-1-20(10) of the Act. Majors is the sole shareholder and officer of TLA. The testimony and other evidence presented at the hearing was ambiguous and incomplete (e.g., there was no evidence presented about how Majors was compensated, if at all, for his services in soliciting prospective Principals), and the parties' post-hearing briefs provided no definitive legal authorities, as to whether either TLA or Majors were "engaged in the business of effecting transactions in securities for the account of others or for . . . [their] own account[s]" within the meaning of Section 35-1-20(3) for purposes of the broker-dealer registration requirements of Section 35-1-410 of the Act. A conclusion that Respondents violated Section 35-1-410 of the Act is somewhat derivative upon a violation of Section 35-1-810 of the Act. Majors would be an "agent" of the issuer under Section 35-1-20(2) for purposes of Section 35-1-415 of the Act and would have been entitled to an issuer sales permit under SC Securities Rule 113-2 (Order 97003, Proposed Rule 113-201(C)), if the TLC Investment Opportunity were a registered offering and if he performed substantial other duties for TLA and was not improperly compensated, etc. The remedial goals of the Act can be adequately achieved by a conclusion merely that Respondents violated Sections 35-1-810 *et seq.* of the Act. A conclusion that Respondents also violated Section 35-1-410 of the Act is problematic, and to a large degree duplicative. Thus, this hearing officer declines to rule on whether the Respondents also violated the broker-dealer or agent registration requirements of Sections 35-1-410 *et seq.* of the Act.

not satisfy the requirements for a prospectus pursuant to a registration of the offer or sale of the TLC Investment Opportunity under Section 35-1-880 of the Act, and that most of the materials would not be permitted for use as "advertisement or other sales literature" under Section 35-1-50 of the Act and South Carolina Securities Statement of Policy with Respect to Advertising of New Issues (Blue Sky Rep. (CCH) ¶51,553). It is not enough for purposes of liability under the antifraud requirements of the Act, however, that there are simply misrepresentations, omissions, or other "puffery" – the misrepresentations or omissions must be material. Section 35-1-1210 of the Act.

A finder of fact could infer materiality from the circumstances. For example, since it appears a likely opportunity for loss of investor's funds would be a mishandling of the funds by TLA, a finder of fact could conclude that Respondents' repetition of the phrase "we never touch your money" without describing the exceptions when the Principals' funds are deposited into Majors' attorney trust account, or Respondents' failure to fully and accurately describe Majors' disbarment by the Georgia Bar or the receivership of Majors' prior Tax Lien Acquisitions company in Georgia were material. Or for sample, since TLA's promotional materials tout TLA's expertise and the Principals are dependent on TLA's expertise to produce a profit from the TLC Investment Opportunity, a finder of fact could conclude that Majors' representation that he authorized and published two definitive books on TLCs that sold thousands of copies and were "best sellers", if not true (and the truth of these representations stretches credibility when Majors cannot furnish a single copy of either "best seller" book at the present), were material.

There has been, however, no persuasive showing of a loss or even of unresolved complaints by investors. In fact, the only evidence about the level of satisfaction of the Principals with regard to the TLC Investment Opportunity is admittedly self-serving (but essentially uncontroverted) testimony from Majors, a witness with an acknowledged tendency toward "puffery", that none of his investors have complained about the TLC Investment Opportunity. A finder of fact could certainly conclude from the absence of testimony by, or other persuasive evidence of, complaining or disgruntled Principals, and Majors' testimony about his generally favorable relationships with his Principals, that TLA's Principals are uniformly satisfied, repeat customers.[5] To impose criminal or even civil procedures against a promoter whose investors appear to be satisfied with their investments would seem to be an odd, and unduly punitive, result.

Moreover, this case turns on a novel legal issue in South Carolina (i.e., whether the "strict vertical com-

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[5] If this matter results in the disconuation of TLA's business, it is not inconceivable to anticipate that TLA's existing investors will be disappointed, if in fact, as the testimony and other evidence suggests, they are indeed satisfied with the TLC Investment Opportunity. Registration of the TLC Investment Opportunity, if practicable, will increase the costs of the enterprise, a cost increase which might be passed on to the investors. However, the policy underlying the securities laws is that the investing public benefits from the disclosure and other regulation imposed by the securities laws, which contribute to more efficient and reliable markets, in ways exceeding the costs and practical limitations which result from compliance. *See generally Howey*, 328 U.S. at 299; Monaghan at 2139-44. This is true even if the particular investors might prefer to eschew the delays, complications, and costs inherent in compliance with the securities laws for a specific investment scheme in which they are presently satisfied.

monality" test is sufficient for purposes of the "common enterprise" element of the *Howey* analysis) about which, in advance of this ruling, reasonable minds could have drawn differing legal conclusions. If the TLC Investment Opportunity did not constitute a "security" under the Act, about which there was uncertainty prior to this ruling, then in the absence of a loss by investors, Majors' puffery and omissions would probably not be regulated, or at least not actionable.[6] The determination that the TLC Investment Opportunity is a "security" is a close question. In light of all of these considerations, it would appear inappropriate to penalize the Respondents for violation of the anti-fraud requirements of the Act for misstatements, omissions, or other "puffery" occurring prior to this ruling. No abuse of the investing public's trust in TLA or Majors has been proven by a demonstration of loss or unresolved complaints. And to accomplish the legitimate objectives of

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[6]The anti-fraud provisions of federal and state securities laws create a remedy that is almost unique in the law since proof of damages is not an element required for a remedy. Outside of the securities laws, misrepresentations, omissions, or other "puffery" by Respondents, in the absence of proof of damages suffered by the Principals, would not ordinarily give rise to a recovery or other remedy, other than perhaps an equitable rescission of the contract. The securities laws were not intended as a codification of common law fraud. They are intended to create a special type of regulatory scheme that is different from common law fraud, with broader goals, providing prevention, enforcement, rescission, and other remedies even where an investor suffers no loss. *See* Monaghan at 2142-43; *see also Pinckney*, 923 F. Supp. at 79 (the prospective investor chose not to invest, and therefore suffered no loss; yet the SEC pursued an enforcement action against the promoters that was upheld on summary judgment). Further prevention would appear to be the only legitimate goal in the instant case, in the absence of a showing of loss or other abuses.

RECOMMENDATION

Based upon the foregoing findings of fact and legal conclusions, this hearing officer makes the following recommendations:

1. The Securities Commissioner should, pursuant to Section 35-1-60 of the Act, issue a final Cease and Desist Order modified from the September 9, 2003 C&D Order to be consistent with the findings of fact and analysis and conclusions of law set forth in (or to incorporate by reference and attached) this Report and Recommendation, and in particular should: (a) find that the TLC Investment Opportunity, as offered and sold prior to September 9, 2003 by TLA, which is controlled by Majors, is an "investment contract" under the definition of "security" in Section 35-1-20(15) of the Act by virtue of the *Howey* case analysis (which has been adopted in South Carolina in the *Garrett* case), satisfying all three of the *Howey* elements: (i) an investment of money under the *Pinckney* case, (ii) in a common enterprise under the "strict vertical commonality" test set forth in the *Pinckney* case, (iii) for which the Principals expect profit to be derived from the efforts of Respondents under the *Waterman, Reynolds,* and *Garrett* cases; (b) prohibit the offer and sale of the TLC Investment Opportunity by Respondents and every successor, affiliate, control person, agent, servent, or employee of either of them, and every entity owned, operated, or directly or indirectly controlled or organized by or on behalf of either of them, in or from the State of South Carolina in violation of the registration requirements of Sections 35-1-810 *et seq.* of the Act; (c) deny and revoke any exemption from such registration requirements of the Act which Respondents and such other persons or entities described above might otherwise have had with respect

to the offer and sale of TLC Investment Opportunity; and (d) grant Respondents the right to review of the Order in the proper court for Richland County, South Carolina, or the county in which the Respondents reside, by filing within thirty days after entry of the Order a proper written petition, as required by Section 35-1-1310 of the Act. As this hearing officer did not conclude[7] that (i) the TLC Investment Opportunity satisfied the "horizontal commonality" test for the definition of an "investment contract" under Section 35-1-20(15) of the Act or constituted a "certificate of interest or participation in a profit-sharing agreement," (ii) the Respondents violated the broker-dealer or agent registration requirements of Section 35-1-410 of the Act, or (iii) the Respondents made material misrepresentations and omissions in connection with the offer and sale of the TLC Investment Opportunity, the modified Cease and Desist Order should exclude any reference to, or enforcement action based on, such issues.

2. Other than the modified Cease and Desist Order described in Recommendation 1 above, the Commission should not pursue criminal or civil penalties against Respondents (unless subsequent complaints or other evidence are received indicating loss or other violations of the anti-fraud requirements of the Act) for violation of the registration requirements of the Act by Respondents in connection with offering and selling the TLC Investment Opportunities prior to September 9, 2003 because

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[7] This hearing officer determind that, in this proceeding, conclusions on these issues were problematic in light of ambiguous or conflicting evidence or uncertainty in the law, and/or were unnecessary to achieve the remedial objectives of the Act in this matter.

this matter turns upon a novel legal issue in South Carolina about which, prior to this ruling, reasonable minds could reach differing conclusions.

3. The Commission should not pursue criminal or civil penalties against Respondents (unless subsequently complaints or other evidence are received indicating loss or other violations of the anti-fraud requirements of the Act) for the specific instances of potential violations of the anti-fraud requirements of the Act by Respondents prior to September 9, 2003, as to which testimony and other evidence was presented at the hearing, because this matter turns upon a novel legal issue in South Carolina about which, prior to this ruling, reasonable minds could reach differing conclusions.

4. The finding in this Report and Recommendation of violation of the registration requirements of the Act by Respondents, and the testimony and other evidence presented at the hearing of specific instances of potential violations of the anti-fraud requirements of the Act, should not alone serve as grounds for denial of an application by TLA and Majors to register the TLC Investment Opportunities (or a future iteration thereof) under Sections 35-1-810 *et seq.* of the Act, or qualify for an exemption from such registration requirements, or to register themselves as securities broker-dealers or agents under Sections 35-1-410 *et seq.* of the Act.[8] Registra-

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[8]This hearing officer notes that under specified conditions, Respondents might not be required to register as broker-dealers or agents under Sections 35-1-410 *et seq.* of the Act in connection with future registered, or certain future exempt, offerings of the TLC Investment Opportunity. *See e.g.*, Sections 35-1-415(1) and (3) of the Act; and SC Securities Rule 113-2 (Order 97003, Proposed Rule 113-201(C)).

tion of the offer and sale of the TLC Opportunity, and the regulation of all of the related promotional activities and disclosures by Respondents, would seem to accomplish the purposes of the Act so long as this proceeding and the results hereof are adequately disclosed in the subject prospectus or other disclosure document. However, this recommendation should not be construed as a mandate that such registrations or exemptions be granted if the applications do not comply with all applicable requirements of the Act and the rules, regulations, and statements of policies promulgated pursuant to the Act, or if evidence of violations of the Act or other wrongdoing by TLA, Majors or their agents other than as described in this Report and Recommendation is found to warrant denial of such registrations or exemptions.

5. No legal conclusion reached or declined in this Report and Recommendation or the modified Cease and Desist Order described in Recommendation 1 above shall prohibit the pursuit by any Principal or other investor of a private right of action against Respondents under Sections 35-1-1490 or -1500 of the Act, if any.

Respectfully submitted,

/s/ G. Marcus Knight
G. Marcus Knight
Hearing Officer

Date: January 13, 2004

Exhibit A

AGENCY CONTRACT

This contract is formed to acquire real property Tax Liens or Tax Lien Certificates, hereafter referred to as TLCs. The undersigned, TAX LIEN AGENTS, Inc., (TLA) an Individually Contracted Purchasing Agent, is hereafter referred to as 'Agent' and the other undersigned, hereafter referred to as 'Principal', are the sole two parties to this two-party employment contract. Both parties agree to the following terms and conditions:

1. Agent will make all purchasing decisions, subject to such criteria as may be specified by Principal. Principal will make all selling decisions. Agent shall pay all expenses of going to TLCs auction sites, searching tax records, evaluating the properties, bidding (it is understood by Principal that, unless Principal instructs Agent otherwise, Agent will bid primarily on tax liens that, in Agent's exclusive opinion, have a reasonable prospect of not being redeemed) and purchasing TLC(s) only in Principal's name or, in event of a Trust, Principal Trust's name. Principal agrees to pay Agent a NON-REFUNDABLE AGENCY FEE and grants an inchoate interest of 50% ownership in any unredeemed TLC(s) to Agent for its valuable service.

2. Principal will give Agent FDIC Insured Bank Cashier's Checks made payable to "COUNTY TREASURER FOR TAX LIENS" or, if Principal is using a fiduciary Trust, will give Principal's Trust a Trust Investment Direction Authorization for the maximum amount that Principal wishes Agent to buy in TLC(s). Each TLC bought will be listed in Principal's name or Trust's name by the issuing governmental entity, hereinafter referred

to as "County", with Principal's address or Trust address as the official notification address. Principal and/or Trust agree that Agent will be notified when anything happens concerning the TLC. After each auction, Principal and/or Trust should get a receipt or a certificate from the County which shows the exact cost of the TLC(s). All monies paid to County in excess of the exact cost of the TLC(s) should be refunded directly back to the Principal or Trust by the County according to that government's policies.

3. If any original TLC is redeemed before its maturity date, Agent agrees that Principal shall keep all redemption monies, including interest and penalties, and Agent shall not be entitled to any of such amounts. If Principal provides the necessary funds to reinvest such proceeds, using the procedures set forth in paragraph 2 above, Agent (without charging any additional agency fee) shall use its best efforts to purchase replacement TLC(s) at the next tax lien auction that Agent attends. Agent further agrees, if Principal so elects, to continue to reinvest redemption monies, at no additional charge, until (a) Principal receives a matured tax lien/certificate or tax deed or (b) thirty six (36) months have passed from the original date of first TLC purchase.

4. Agent SHALL HAVE THE RIGHT OF FIRST REFUSAL should Principal and/or Trust decides to sell or transfer ownership of the TLC(s) or resultant property purchased under this contract. If Principal/Trust sells or otherwise transfers its ownership of a TLC to any other party, the transferee or purchasing party is required to become the new Principal party and must agree in writing to the same terms and conditions as this contract. If Principal/Trust violates the aforesaid conditions, Principal/Trust must immediately buy out

Agent's interest by paying to Agent 50% of the then appraised value of the real property that secures each pertinent TLC. If Principal uses a Trust to acquire and hold the TLC, it is also agreed that once Agent is notified of any sale proceeds, if Agent does not file a written demand with the Trustee of such Trust for the amounts due to Agent in accordance with this contract (with the exception of a transfer condition, for which no claim against Trustee can be made at any time) within 90 days after payment is received by Trustee, no future demands or claims for such amounts may be made against Trustee, and any such demand or claim must be made by Agent directly to the Principal and Grantor of the Trust.

5. If not in a fiduciary Trust, once a TLC's period of redemption has expired, Principal agrees, upon Agent's request, to immediately sign such papers as are legally required to assign, convey, register and confirm that Agent has an earned 50% interest in the net profit of the TLC and in any resultant Tax Deed, Warranty Deed, Property Deed, Treasurer's Deed or such other documents and instruments regarding title to the related real property that may be issued by the County. Unless Principal and Agent otherwise agree, once the Government issues a tax deed or title to Principal, Principal shall promptly thereafter commence good faith efforts to quiet the title and sell such property. Agent, upon Principal's request, will contact and negotiate terms with a third party attorney who Principal can then retain to prepare documents necessary to arrange for good and marketable (quiet) title to the property represented by the TLC(s). If and to the extent that Principal so requests, Agent shall conduct or supervise the listing, negotiation and sale of the property, and shall retain real

estate brokers, agents, and such other professionals as Agent deems advisable. At closing, the proceeds of the sale will be applied (1) to repay Principal its purchase price, including direct out-of-pocket costs, paid for the TLC, and (2) to reimburse Agent for any actual direct out-of-pocket costs paid by Agent on Principal's behalf in connection with the marketing and sale of the property. Thereafter, any remaining net proceeds will be divided equally between Principal and Agent by the escrow fiduciary per standard closing procedures. If a TLC is held by a fiduciary Trust and such Trust cannot legally hold a deed in that state, then the TLC itself will be marketed and sold by Principal (or at Principal's request, by Agent) as if the TLC is the marketable deed, and the gross proceeds of the sale, as determined by the closing fiduciary as final authority, will be transferred back to Trust to replace the TLC, upon receipt of the gross proceeds, the Trust will pay Agent its invoice for actual out-of-pocket costs paid by Agent on Principal's behalf and then Agent's invoice for 50% of the net gain on sale of the TLC.

6. Once a TLC's period of redemption has expired, if either party elects to buy the other party's 50% interest, each party will select one certified real estate appraiser, who in turn will jointly select a third certified appraiser. The resulting sale price to be paid, either by Principal or by Agent for the other party's 50% interest, will be 50% of the average of all three appraisals.

7. Except for the purchase by Agent of the TLC itself and the incidental costs of sale per paragraph 5, no party may obligate the other party to any liabilities without the written consent of the other party.

8. Principal understands, while there are no risks in owning government sold and issued TLC(s) that are redeemed (paid off), there are potential down side financial risks if a TLC matures into a property deed as the underlying property market value could substantially drop during the tax lien maturity period.

9. This contract is the full and complete agreement between the parties. This contract shall be governed by and construed in accordance with the laws of the State of South Carolina. Time is of the essence.

NOTICE: COUNTY TAX LIENS ARE SOLD AND REGULATED BY LAWS OF THE STATE THEY ARE LOCATED IN AND THIS AGREEMENT IS VOID ONLY WHERE IT CONFLICTS WITH THOSE LAWS.

(If Principal is a legal resident of California, use California agency contract)

AGREED this ___ day of _____, 200__

AGENT
TAX LIEN AGENTS, INC.
by

_____

Print Name _____
Title _____
4502 Hwy. 17 Bypass So., Myrtle Beach, SC 29588
Phone 843-293-6307
Fax 843-293-6340

AGREED this ___ day of _____, 200__

PRINCIPAL

Print Name _____
Signature _____

Address _____

City _____ State _____ Zip _____

Day Phone _____

Night Phone _____

Fax Number _____

SS# or Fed. ID# _____

Principal's Witness Signature _____ Date _____

Principal's Witness' Address and Phone _____

_____

Agent's Witness' Signature _____ Date _____

FOR AGENT'S USE ONLY

W9 or W8 _____

Amount of TLC(s) to purchase: $_____

Fee Paid: $ _____ Referred by: _____

APPENDIX C

[Filed May 23, 2007]

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

Daniel E. Shearouse
Clerk Of Court

Brenda F. Shealy
Chief Deputy Clerk

Post Office Box 11330
Columbia, South Carolina 29211
(803) 734-1080
FAX (803) 734-1499

May 23, 2007

Mr. Ned Majors
133A Ivy Stone Drive
Myrtle Beach, SC 29588

Re: Majors, Ned v. SC Securities Commission

Dear Mr. Majors:

The Court has issued the following order on your Petition for Rehearing:

"Petition for rehearing is denied.

s/ Jean H. Toal C.J.
s/ James E. Moore J.
s/ E.C. Burnett III J.
s/ Costa P. Pleicones J.

Justice John H. Waller, Jr., not participating.

May 23, 2007."

The remittutur is today being forwarded to the lower court.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/jjp

cc: John F. Beach, Esquire
John J. Pringle, Jr., Esquite
Scott E. Hultstrand, Esquire
Tracy A. Meyers, Esquire

APPENDIX D

[Filed Feb. 11, 2004]

STATE OF SOUTH CAROLINA
SECURITIES COMMISSION

IN THE MATTER OF:

Ned B. Majors and
Tax Lien Agents, Inc.

Respondents.

ADMINISTRATIVE PROCEEDING
FINAL ORDER TO CEASE AND DESIST
SELLING UNREGISTERED SECURITIES

Case No. 03010

I. PROCEDURAL HISTORY

This matter arose from the issuance by the South Carolina Securities Commission (the "Commission") of an Order to Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud (the "C&D Order") to Ned B. Majors ("Majors") and Tax Lien Agents, Inc. ("TLA"), on September 9, 2003. Respondents made a timely requrest for a hearing to review the issuance of the C&D Order and to determine whether a final order should be issued.

On October 23, 2003, the South Carolina Attorney General, acting in his statutory capacity as the State's Securities Commissioner, appointed attorney G. Marcus Knight as the administrative hearing officer for this mat-

ter pursuant to Section 35-1-1450 of the South Carolina Uniform Securities Act, S.C. Code Ann. §35-1-10, *et. seq.* (the "Act"), and delegated to the hearing officer such authority as is necessary to conduct the hearing and render a Report and Recommendation. A public hearing was conducted on October 30 and 31, 2003 pursuant to Section 35-1-90 of the South Carolina Uniform Securities Act, S.C. Code Ann. §35-1-10, *et seq.* (the "Act"), and the following findings of fact and conclusion of law result.

II. FINDINGS OF FACT

TLA is a South Carolina corporation organized by filing of its Articles of Incorporation with the South Carolina Secretary of State on November 19, 1998. TLA commenced its business during 1999 and has, from the inception, operated its business principally from Myrtle Beach, South Carolina. Majors is a resident of South Carolina and the sole shareholder and officer of TLA.

The primary business activity of TLA centers around the bidding and purchasing of tax lien certificates ("TLCs") at tax lien auctions or sales conducted by the taxing authorities of city and county governments throughout approximately twenty-six states in the United States. Purchasers of TLCs bid competitively for their purchase at auctions conducted by the governmental entity by offering to accept a lower interest rate than the statutorily prescribed rate to which the issuing governmental entity is entitled. TLCs generally mature under the applicable states' laws in priods of one to three years. Each of the unmatured TLCs may be redeemed by the owner of the underlying property by paying the past due taxes, plus penalties and interest at statutorily prescribed rates, to the issuing govern-

mental entity, which in turn pays the amount of the TLCs' purchase price plus the bid interest rate to the holder of the TLCs.

Each of the matured TLCs which are not redeemed create for the holder of the TLCs the right to obtain a tax deed or similar instrument of conveyance for the underlying property. The TLCs holder must often undertake legal action to quiet or clear his title to underlying property of any other liens or encumberances on the title which are junior to the tax lien by which the holder of the TLCs obtains title. According to Majors' testimony, all or virtually all other liens on the underlying property, including bank mortgages and federal tax liens, are junior to the interest of the holder of the TLCs, and accordingly can be extinguished in the process of quieting title. The stated objective of an investment in TLCs is to either (1) receive a return of the original purchase price for the TLCs plus payment of interest and penalties from the redemption of unmatured TLCs by the underlying property owner, or (2) obtain marketabl title to and sell at a significant profit the property underlying matured TLCs.

In conducting this enterprise, TLA serves as a contract agent for investors (the "Principals"; individually, a "Principal") who furnish the funds required to purchase the TLCs. Most of the Principals appear to be individual investors or trusts controlled by individual investors. Many of these Principals appear to be South Carolina residents or to have been present in South Carolina when solicited by TLA. TLA solicits Principals pursuant to newspaper advertisements, booths at conventions and expositions, a website, seminars, and tapes, among other methods. TLA has published advertisements in newspapers in South Carolina and conducted seminars and

sponsored booths at conventions and expositions in South Carolina in recent years. Majors' testimony and the other evidence presented at the hearing requires the deduction that TLA made offers and sales of TLCs to considerably more than twenty-five persons during the twelve-month period preceding September 9, 2003, in or from the State of South Carolina. The relationship between the Principals and TLA purports to be governed by document denominated "Agency Contract."

In its advertising, video tapes, and other promotional materials, TLA claimed, among other things, that: "We eliminate all the risk. We do all the work. We never touch your money." Transcript of Hearing of October 30-31, 2003 ("Tr."), p. 149, lines 5-6. TLA also claimed in its promotional materials that "every investment check . . . [the Principal] make[s] will be made directly to the government selling the tax lien . . . All tax liens will be purchased and recorded by the government in your name and address only . . . Ned Majors, our founder, is the recognized authority on real estate tax liens. He wrote the book. . . . We can only make a profit when you receive a property deed and sell it for more than your total cost. . . . We do all the work . . . And . . . we never touch your money." Tr. p. 146, l. 21 – p. 147, l. 9. TLA advertises that Principals can expect a "government guaranteed eight to twenty-five percent . . . annual interest" return on redeemed TLCs and an "expectation of a potential yield of 10,000 percent" on the sale of the property underlying matured TLCs. Tr., p. 57, ll. 8-11. In its promotional materials, TLA claims that "our growth expectation is not speculative. We don't have any speculation in our business." Tr. p. 96, ll. 23-25.

In TLA's promotional materials, Majors also emphasizes the importance of TLA's experience, connections, and volume leverage in connection with selecting, negotiating, and engaging attorneys to quiet title to, and real estate brokers to market and sell, the properties underlying matured TLCs. *See e.g.*, Tr. at p. 109, l. 22 – p. 113, l. 5. Majors testified that these promotional materials were sent to prospective Principals from TLA's offices in Myrtle Beach, South Carolina, and were given to prospective Principals at seminar and expositions conducted in Myrtle Beach and Charleston, South Carolina, and other locations in various states.

In the Agency Contract, each of the Principals appoints TLA as its agent to bid on and purchase TLCs in the Principal's name or in the name of a trust designated by the Principal. The funding mechanism for purchase of TLCs under the Agency Contract requires the Principal to provide TLA with cashiers checks from a FDIC insured bank payable to "County Treasurer for Tax Liens". The Agency Contract also states that "each TLC bought will be listed in Principal's name . . . by the issuing governmental entity . . . with Principal's address . . . as the official notification address." The Agency Contract further states that if the amounts of the cashiers checks provided by the Principal for purposes of purchasing TLCs exceeds the actual cost of the TLCs purchased by TLA on behalf of the Principal, then the excess will be refunded by the governmental entity to the Principal.

Under the Agency Contract, the Principal will be entitled to all interest and penalties paid in connection with any redemption of TLCs by an underlying property owner prior to maturity of the TLC. In the event of a redemption of one of the TLCs, the Agency Contract provides that TLA will continue to reinvest the redemp-

tion proceeds, at no additional charge for an agency fee, until the Principal either receives a matured TLC (or tax deed) or a period of thirty-six months expires. In return for TLA's services under the Agency Contract, the Principal agrees to pay TLA a "non-refundable agency fee" (usually in the range of several hundred dollars) and grants to TLA an "inchoate interest of 50% ownership" in any TLCs purchased by the Agent for the Principal which are not redeemed by the underlying property owners within the statutorily prescribed time, and as a result of which "go to deed". Under the Agency Contract, the Principal is obligated to convey the 50% interest "in the net profit of the TLC and in any resultant tax deed" to TLA, and the Principal must "promptly thereafter commence good faith efforts to quiet the title and sell" the property underlying the matured TLC. At the Principal's request, TLA is obligated to engage legal counsel and real estate brokers and "such other professionals as . . . [TLA] deems advisable" to complete the process of selling the property underlying matured TLCs.

Upon the sale of the underlying property, the closing agent is directed by the terms of the Agency Contract to first reimburse the Principal for its TLC purchase price and the direct out-of-pocket costs, second reimburst TLA for its direct out-of-pocket costs paid on the Principal's behalf in connection with the marketing and sale of the underlying property, and third divide equally between the Principal and TLA any remaining net proceeds of the sale. The Agency Contract also grants to TLA a right of first refusal should the Principal decide to sell the TLCs or the underlying property, and requires the Principal to purchase TLA's 50% interest at 50% of the appraised value of the property underlying the

matured TLCs if the Principal desires to keep the property. *See* Tr. at p. 298, ll. 15-25. The Agency Contract contains an acknowledgement by the Principal that "while there are no risks in owning government sold and issued TLC(c) that are redeemed (paid off), there are potential downside financial risks if a TLC matures into a property deed as the underlying property market value could substantially drop during the tax lien maturity period".

Majors testified that while the Agency Contract grants the Principals the legal right to specify certain criteria governing the purchase of TLCs and to select the attorneys, real estate agents, and other professionals necessary to clear title and sell the property underlying matured TLCs, he discourages the exercise of such rights (Tr. p. 296, ll. 18-22), and that such rights are rarely exercised by the Principals. In addition, in his promotional video Majors stated that "I can't tell you right now where your money – which auction you're going to go to or which county, but we know a county treasurer in every county of all 2,642 counties who sell tax liens." Tr. p. 102, ll. 17-22. Majors confirmed that most of his Principals live a considerable distance from the properties to which their TLCs apply and that they rarely exercise their rights to select professionals needed to clear title and sell the underlying properties. Tr. p. 299, l. 23 – p. 300, l. 12.

TLA's promotional video, which appears from the testimony to have been widely distributed to prospective Principals, also establishes an offer of liquidity in the TLCs purchased by TLA for its Principals. In the video, Majors tells his prospective Principals that "if you go off and buy tax liens [on] your own, there is no liquidity. Because the tax collector's not going to give you your money back . . . However, with our program, if you hire

us as our agent, and you want to sell your tax liens, we'll buy them from you. Or we'll have clients that buy them from you. And usually within a week, you know, we can handle up to about four or $500,000 a week easily. I get that much back on redemptions almost every week. . . . After you buy them, we'll not only buy them back from you, but we'll pay you the eight percent interest a year on your money." Tr. p. 97, ll. 5-23. Majors testified that the main source of funding for TLA's compliance with this offer to purchase the TLCs from Principals was its profits off of its agency fees and its share of the profits when property underlying the matured TLCs are sold. Tr. p. 306, ll. 17-22. In TLA's promotional video, Majors stated that TLA's 50% interest in the underlying properties is "the only place where I make my money." Tr. p. 97, ll. 5-23. The parties stipulated that the video was sent to prospective Principals in South Carolina.

Neither the offers nor the sales of opportunities to invest in TLCs pursuant to TLA's Agency Contract and related services (singularly the "TLC Investment Opportunity" and plurally the "TLC Investment Opportunities") have been registered with the Commission pursuant to Section 35-1-810 *et seq.* of the Act. No claim that the TLC Investment Opportunity satisfied the elements of an exemption from the registration requirements of the Act was made under Sections 35-1-310 or 35-1-320 of the Act, nor would the testimony and evidence presented at the hearing tend to support such a claim of an exemption. No claim that the TLC Investment Opportunity constituted a "federal covered security" was made under Sections 35-1-810(c) and 35-1-1100 of the Act, nor would the testimony and evidence presented at the hearing tend to support such a claim. TLA and Majors were

not registered as broker-dealers or agents under Section 35-1-410 *et seq.* of the Act. No claim was asserted by TLA or Majors that an exemption from the broker-dealer and agent licensing requirements of the Act would apply to them under Section 35-1-415 of the Act, nor would the testimony and evidence presented at the hearing tend to support such a claim.

In their opening statements and post-hearing briefs, the parties agreed that the principal issues in this matter are (1) whether the TLC Investment Opportunity constituted a "security" as defined in Section 35-1-20 of the Act and (2) whether the Commission's Cease and Desist Order should be upheld.

Counsel for the Commission also introduced testimony and other evidence at the hearing of misrepresentations and omissions by TLA and Majors in connection with the promotion and sale of the TLC Investment Opportunities. Majors stipulated to "puffery". Tr. at p. 248, ll. 23-25.

III. CONCLUSION OF LAW

A. THE TLC INVESTMENT OPPORTUNITY IS A SECURITY UNDER THE HOWEY TEST FOR INVESTMENT CONTRACTS

The TLC Investment Opportunity constitutes a "security" for purposes of the Act because, under the Howey test, it is an "investment contract." The term "investment contract", as used in the definition of the term "security" for purposes of Section 35-1-20(15) of the Act, has apparently not been defined in any fashion meaningful to this matter by the courts of this State. However, it is well established that the South Carolina courts seek guidance from the federal courts in interpreting provisions of the Act which parallel federal stat-

utes, such as the definition of the term "security". *Carver. v. Blanford,* 288 S.C. 309, 310, 342 S.E.2d 406, 407 (1986); *McGaha v. Moseley,* 283 S.C. 268, 273, 322 S.E.2d 461, 464 (1984); *Bradley v. Hullander,* 272 S.C. 6, 249 S.E.2d 486 (1978). The seminal case for the definition of the term "investment contract" is *SEC v. W. J: Howey Co.,* 328 U.S. 293, 298, 66 S. Ct. 1100, 1102-03 (1946). In *Howey* the United States Supreme Court defined an "investment contract" as any arrangement whereby an investor makes (a) an investment of money (b) in a common enterprise (c) with an expectation of profits solely from the efforts of the promoter or a third party. *Teague v. Bakker,* 35 F.3d 978, 986 (4th Cir. 1994), *cert. denied,* 513 U.S. 1153, 115 S. Ct. 1107 (1995) (citing *Howey,* 328 U.S. 399-300, 66 S. Ct. 1103). The South Carolina Court of Appeals has adopted the *Howey* analysis. *Garrett v. Snedigar,* 293 S.C. 176, 359 S.E.2d 283, 285 (Ct. App. 1987), *rev'd on other grounds Olson v. Faculty House of Carolina, Inc.,* 354 S.C. 1161, 580 S.E.2d 440 (2003).

(1) Investment of Money. An "investment of money" means, for purposes of the definition of an "investment contract", that the investor must have committed his assets to the enterprise in such a manner as to subject himself to financial loss. *SEC v. Pinckney,* 923 F. Supp. 76, 80 (E.D.N.C. 1996). In the instant case, the Principals wrote checks to TLA for the non-refundable agency fee and invested money in TLCs purchased by TLA on their behalf. Majors testified, that while he promoted and believed that the TLC Investment Opportunity was a safe investment, the Principals could lose some or all of their investment if the underlying property had at the time of sale a

value less than the amount of the investment. The terms of the Agency Contract included a specific acknowledgement by the Principal that this "potential down side financial risk" existed. In addition, the Principals were required to grant TLA a "50% inchoate interest" in each TLC that TLA purchases on behalf of the Principal, which is a further commitment of the Principal's assets to the enterprise. Thus, the first element of the *Howey* test, requiring an "investment of money", is satisfied in the instant case. *Cf. Pinckney*, 923 F. Supp. at 81 (Although the promoter represented that the investor's funds would be under the investor's control, profits would be generated by trading of the financial instruments in which the investment was made. The investor would have been subject to financial loss by virtue of the trades to be made.).

(2) **Common Enterprise.** The *Howey* decision of investment contract requires as a second element that the particular transaction constitute a "common enterprise". In this regard, the *Howey* analysis contemplates that the transaction will involve a relationship between investors. The *Howey* case, however, does not define precisely the required nature of the relationship or the required number of investors that must be involved. As a result, the courts have subsequently developed three different tests to determine whether the requisite "common enterprise" element is satisfied: (i) horizontal commonality, (ii) strict vertical commonality, and (iii) broad vertical commonality. Maura K. Monaghan, Note, *An Uncommon State of Confusion: The Common Enterprise Element of Investment Contract Analysis*, 63 Fordham L. Rev. 2135, 2152 (1995). While the Fourth Circuit Court of Appeals has not yet ruled definitely on the applicable test for this element of the *Howey*

analysis, courts in the Fourth Circuit have recognized both horizontal commonality and strict vertical commonality as applicable and appropriate tests. *Pinckney*, 923 F. Supp. at 81-82; *Bailey v. J.W.J. Properties, Inc.*, 703 F. Supp. 478, 492 (W.D.Va. 1989); *S.E.C. v. Dowdell*, 202 WL 424595, No. CIV.A. 3:01CV0016, at *8 (W.D.Va. March 14, 2002); *Waterman v. Alta Verde Indus., Inc.*, 643 F. Supp. 797, 803 (E.D.N.C. 1986). Because strict vertical commonality exists in this present case, neither a ruling on whether horizontal commonality applies to this case nor a holding as to the legal validity of the broad vertical commonality test is necessary.

SEC v. Pinckney, 923 F. Supp. 76 (E.D.N.C. 1996), enunciates the proper analysis of the strict vertical commonality test. In *Pinckney*, the Court for the Eastern District of North Carolina held that "a common enterprise may be established by showing that the investor's profits are directly related to the promoter's profits". *Pinckney*, 923 F. Supp. at 82. In reaching this holding, the Court concluded that the often more restrictive horizontal commonality test is not the exclusive test for the "common enterprise" element of the *Howey* analysis. To rely exclusively on horizontal commonality would be "overly restrictive and not in keeping with the Act's remedial goal of preventing . . . [violations of the securities laws] in connection with an offer of what would otherwise be a security but for the absence of multiple investors." *Pinckney*, 923 F. Supp. at 82. Exclusive reliance on horizontal commonality would "also make the test easy to evade by a disingenuous promoter who simply maintains separate bank accounts or who disspates the investors' contributions immediately". Monaghan at 2157.

In the instant matter, TLA's Agency Contract with its Principals provides expressly for an equal 50/50 sharing between TLA and the Principal of the profits derived from the sale of the property underlying matured TLCs, after the Principal and TLA are each reimbursed their respective out-of-pocket costs. In his tesimony, Majors acknowledged that this was the primary motivation for TLA's undertaking this enterprise and the only source of profit for TLA, as the relatively nominal non-refundable agency fee did not cover the costs of operations. Thus, the Principals' profits are indeed directly related to TLA's profits and vice versa.

In the expert testimony of Attorney Robert A. Singer offered by the Respondents at the hearing, and in Respondents' post-hearing briefs, Respondents contend that because in the instant situation TLA's revenues are derived from the Principals' profits, that this is the "exact opposite of the relationship required . . . to show strict vertical commonality". Respondents' Brief dated November 26, 2003, p. 17. However, in *Pinckney,* which was a summary judgment case cited in Respondents' Briefs, the court concluded that "evidence . . . that . . . [the promoters'] fortunes would be linked to . . . [the investor's] return on the investment and those fortunes would be derived from a percentage of the [investor's] return" was legally sufficient to establish the existence of a common enterprise. *Pinckney,* 923 F. Supp. at 82. In reaching this conclusion, the *Pinckney* court analyzed whether an investment in "prime bank instruments" by an individual investor would satisfy the strict vertical commonality test for purposes of the "common enterprise" element of the *Howey* analysis. In *Pinckney,* the defendants were promoters who would profit only as a result of commissions or similar payments of a percentage of the return received by the investor.

Thus, the *Pinckney* court reached a conclusion that the promoter's profit being linked to the investor's profit has the same impact, for purposes of strict vertical commonality, as the investor's profit being linked to the promoter's profit. In other words, *Pinckney* held that (1) it is legally sufficient that the profit of the investor and the promoter are linked and (2) it is not determinative for purposes of the strict vertical commonality test whose profits are derivative upon the profits of whom. This is particularly so in the instant matter since TLA has from the beginning of the arrangement a 50% inchoate interest in the profits of the sale of property underlying matured TLCs. Both the Principals and TLA profit from the sale of the property in the same fashion and at the same time, and pursuant to parallel and equal interests. *SEC v. R. G. Reynolds Enter., Inc.*, 952 F.2d 1125, 1130-31 (9th Cir. 1991) ("One indicator of vertical commonality, though by no means the only indicator, is an arrangement to share profits on a percentage basis between the investor and the . . . promoter. . . In the instant case, [the promoter] . . . told investors he would take a management fee based on a percentage of profits, thus making his own profit contingent on the profit of his investors.")

Moreover, that a promoter can develop investment vehicles whereby the promoter's profits are derived from the investor's profits, and not vice versa, should not eliminate the application of the securities laws and the availability of the protections of investors intended to be afforded thereby, especially in light of *Howey's* conclusion that the purpose of the inclusion of the term "investment contract" in the definition of "security" was to provide a flexible term that will achieve the purposes of the securities laws in a variety of changing

situations in a dynamic marketplace. Monaghan at 2145 (citing *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S.Ct. 120 (1943)).

Therefore, "strict vertical commonality" is an appropriate test for the "common enterprise" element of the *Howey* analysis, and the *Pinckney* case analysis is apposite. Moreover, under the *Pinckney* analysis, the facts of the instant matter satisfy the "strict vertical commonality" test for the "common enterprise" element of the *Howey* analysis.

(3) Expectation of Profits from the Efforts of Others. The third element of the *Howey* analysis is whether the investor had an expectation of profits "solely" from the efforts of the promoter or third party. Monaghan at 2137. This element of the *Howey* analysis addresses the degree of control by the investor over the profit-making aspects of the transaction. Monaghan at 2149. Over the years since the enunciation of the *Howey* analysis, the courts have not strictly construed the word "solely". *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 920 (4th Cir. 1990); *Pinckney*, 923 F. Supp. at 82. Rather, post-*Howey* cases have interpreted "solely" to mean "largely" or "principally". Monaghan at 2149. This test can be met if the most essential functions or duties must be performed by others and not by the investor. *Bailey*, 904 F.2d at 920; *see also Garrett*, 359 S.E.2d at 285-86. Moreover, the court is not required to look exclusively at the language of the contract. "Rather it must consider the economic realities of the situation to determine whether the investor has any real control over the management of his investment." *Waterman*, 643 F. Supp. at 804; *see also Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003) ("What matters more than the form of an investment scheme is

the 'economic reality' that it represents.") *See generally* South Carolina Securities Statement of Policy 95-2 (membership interests in a member-managed limited liability company will constitute securities where the "facts and circumstances render substantially meaningless the managerial powers" of the members despite the rights of control granted to members by statute or the operating agreement).

In the *Waterman* case, the court focused on the promoter's managerial efforts that could cause the investment to increase in value, the manager's special expertise in selecting items within a particular class of items which should appreciate at a faster rate than a particular class in general, and the manager's efforts in dealing with the property the investor was not equipped and unable to manage. In *Waterman*, the investor had a contractual right to manage the feeding and care of the cattle in which the investor invested; however, the court found that the investor could not have invested in a cattle operation except through an operation managed in a fashion such as offered by the promoter. The investor seldom was able to visit the operation and lacked the expertise or time to manage the cattle operation. The court concluded that, in looking at the reality of the situation, the investor did not in fact have any real control over the maintenance of the investment. In reaching this conclusion, the court focused on the promoter's representations that it would provide a "turn-key package" and its advertisements that it "handles everything" for its investors. *Waterman*, 643 F. Supp. at 805-806. As a result, the *Waterman* court found that this third element of the *Howey* analysis was satisfied despite the contractual right of the investor to determine when to sell the cattle. This conclusion was based on the impracticality of

the investor's having any real control over the decisions. *Waterman*, 643 F. Supp. at 806; *see also SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1341 (9th Cir. 1994).

Similarly, the essential functions from which the profit[1] is derived in this present matter were to be performed by TLA and Majors. The Principals typically have no input into what TLCs are purchased for them. They merely sign the Agency Control and provide the funds to TLA, relying on TLA to screen the properties, select the TLCs, attend the auction, conduct the bid, and process the paperwork. The selection of TLCs is the essential step in making a profit – TLA touts its expertise in selecting TLCs that will mature to permit a sale of the underlying property for a value greater than the amount of the investment, and the Agency Contract reserves to TLA the essential decision-making authority for the selection of TLCs to purchase.

Majors and TLA also promote the TLC Investment Opportunity as one in which the Principals have to do little or nothing, and tout repetitively that "we do all the work". While the Agency Contract technically leaves to the Principal the right to select legal counsel, real estate brokers, and other professionals necessary to quiet the title and sell the property underlying matured TLCs, this right is no more than rarely exercised, according to Majors' testimony. Moreover, the Principals have no realistic ability to control the sale of the property underlying the matured TLCs. Under the

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[1] It is indisputable that the Principals expect a "profit" from their investment with TLA and Majors. All of TLA's promotional materials hype the return on investment that prospective Principals can expect (*see e.g.*, Tr. p. 57, ll. 8-11), and in his testimony, Majors frequently referred to "profits" for investors and TLA from the sale of the properties underlying the TLCs.

Agency Contract, the Principals technically have an obligation to use their best efforts to sell the property, and if TLA requests, immediately convey to TLA the 50% inchoate interest in the property, or in the alternative they must buy TLA's 50% interest in the property at 50% of its appraised value if the Principals wish to retain the property. Although the Principals technically must bear the costs and other burdens of compliance with these obligations, TLA offers in its marketing materials to use its experience, connections, and volume leverage to control and minimize the Principals' technical obligations.

Thus, the obligations imposed on the Principals by the Agency Contract create pressure on the Principals to let TLA "do all the work" to quiet the title and sell the property. The Principals are most often located far from the properties. TLA's marketing program almost ensures that it will most frequently purchase TLCs for Principals who are located nowhere near the location of the Principals. Majors even markets that he does not know, at the time of a seminar when Principals are solicited and contracted, where their money will be invested. The Principals have virtually no input into the selection, identity, characteristics, or location of the underlying properties at the time the TLCs are purchased for them, and generally have relatively small units of investment in separate properties located in various states, which would not justify travel to, or other long-distance control over, the properties or the sale process.

Given the volume of properties in the overall enterprise, as managed by TLA, and TLA's heavy promotion of its expertise, experience, services, and connections with regard to selecting TLCs and selling the underlying properties in an efficient, fast, and profitable manner,

the Principals' technical legal right to control the sale process is specious. *See Reynolds*, 952 F.2d at 1133-34 ("While the sales contract gave investors the right to make other arrangements for the refining of their ore, there is no evidence that a single investor exercised that right. Promotional materials for the program did not emphasize investors' legal right to refine the ore themselves but rather . . . [the Promoter's] commitment to build a new refinery at which investor's ore would be processed. Furthermore, since the refining contract was included in the price paid for the ore, investors would have incurred unnecessary costs if they had the ore transported and refined elsewhere."). The mere existence of contractual rights of control granted in the Agency Contract to the Principals is not determinative. *Robinson*, 349 F.3d at 170 ("Agreements do not annul the securities laws by retaining nominal powers for investors unable to exercise them.").

It is unrealistic to anticipate that the Principals would incur the cost and hassle inherent in exercising this control, and it is completely consistent with the realities of the overall situation to conclude that the efforts of TLA and Majors (e.g., the handling of the complicated paperwork for, and expert attendance at, remote auction sales of TLCs in a wide variety of locations throughout twenty-six states, the selection and purchae of TLCs that are more likely to mature for sale at values greater than the amount of investment, the replacement of redeemed TLCs with new TLCs at no additional charge, the offer and arrangement of liquidity in the Principals' investment in TLCs, the arrangement of Section 1031 exchange opportunities, and the expert selection and negotiation with professionals to sell the underlying properties efficiently, quickly, and profitably) are the

"undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973), *cert. denied*, 414 U.S. 821, 94 S. Ct. 117 (1973). These services are also the emphasized core of TLA's marketing program. By virtue of the realities of the situation, TLA and Majors have and will perform all of the essential functions of managing the TLC Investment Opportunity, and not the Principals.[2] *See Pinckney*, 923 F. Supp. at 82; *see also Garrett*, 359 S.E.2d at 286. Thus, the third element of the *Howey* test, requiring an "expectation of profits 'solely' from the efforts of the promoter or third party" is satisfied in the instant case.

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[2]As an analogy, Respondent's expert Attorney Singer testified that the contractual and statutory rights of general partners of general partnerships and members of member-managed limited liability companies to control the management of the business entity resulted in these investments not satisfying the *Howey* analysis, meaning these investments were held not to be "securities". However, the case law and statements of policy to which Attorney Singer referred take exception from the indicated result, and subject such investments to the securities laws, where it is impractical or unrealistic that the general partners or members can or will be able to exercise effectively such rights of control. *See e.g., Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), *cert. denied*, 454 U.S. 897, 102 S. Ct. 396 (1981); South Carolina Securities Statement of Policy 95-2 ("The analytical pattern usually turns, in essence, upon a qualitative analysis about the meaningful participation of investors in management of the entity".).

B. THE ISSUANCE OF A FINAL CEASE AND DESIST ORDER IS IN THE PUBLIC INTEREST FOR THE PROTECTION OF SOUTH CAROLINA INVESTORS AND CONSISTENT WITH THE PURPOSES FAIRLY INTENDED BY THE POLICY AND PROVISIONS OF THE ACT.

Testimony and promotional materials introduced into evidence at the hearing included "puffery" that would be inappropriate, and omitted disclosures that would be expected, in a registered securities offering. It is clear that TLA's promotional materials would not satisfy the requirements for a prospectus pursuant to a registration of the offer or sale of the TLC Investment Opportunity under Section 35-1-880 of the Act, and that most of the materials would not be permitted for use as "advertisement or other sale literature" under Section 35-1-50 of the Act and South Carolina Securities Statement of Policy with Respect to Advertising of New Issues (Blue Sky Rep. (CCH) ¶51,553).

Since it appears that a likely opportunity for loss of investor's funds would be a mishandling of the funds by TLA, Respondents' repetition of the phrase "we never touch your money" without describing the exceptions when the Principals' funds are deposited into Majors' attorney trust account, Respondents' failure to fully and accurately describe Majors' disbarment by the Georgia Bar, and the fact of the receivership of Majors' prior Tax Lien Acquisitions company in Georgia were all material matters. Additionally, for example, since TLA's promotional materials tout TLA's expertise and the Principals are dependent on TLA's expertise to produce a profit from the TLC Investment Opportunity, Majors' representation that he authored and published two definitive

books on TLCs which sold thousands of copies and were "best sellers", certainly were material. And given that Majors cannot furnish a single copy of either "best seller" book at the present, the truth of these representations is suspect.

C. BECAUSE THE TLC INVESTMENT OPPORTUNITY IS A SECURITY AND THE PUBLIC INTEREST REQUIREMENT IS MET, A FINAL CEASE AND DESIST ORDER IS APPROPRIATE.

The TLC Investment Opportunity offered and sold by TLA, which was controlled by Majors, is a "security" because it is an "investment contract" under Section 35-1-20(15) of the Act. The TLC Investment Opportunity satisfies all three elements of the *Howey* analysis for investment contracts because it is: (i) an investment of money under the *Pickney* case, (ii) in a common enterprise under the strict vertical commonality test set forth in *Pickney*, (iii) for which the Principals expect profit to be derived from the efforts of TLA and Majors under the *Waterman, Reynolds,* and *Garrett* cases. This conclusion is supported by the methods and content of the promotional materials and the activity of TLA and Majors, which tout the TLC Investment Opportunity as a lucrative, passive, remote investment, in which TLA and Majors "do all the work". The realities of the overall situation and the nature of TLA's promotional materials override the technical rights of control granted to the Principals in the Agency Contract.

Since the TLC Investment Opportunity is a "security" under the Act, then the offer and sale of the TLC Investment Opportunity are subject to regulation of the Act

and jurisdiction of the Commission. Respondents have not sustained the burden of proof under Section 35-1-340 of the Act that an exemption from the registration requirements is applicable to the transaction. Moreover, it would appear that no such exemption could be sustained under the facts as presented at the hearing. *See e.g., Waterman,* 643 F. Supp. at 807 ("[P]ublic advertising is incompatible with the claim of a private offering") (quoting *Hill York Corp. v. American Int'l Franchise, Inc.*, 448 F.2d 680, 689 (5th Cir. 1971)). It is undisputed that neither the TLC Investment Opportunity offered and sold by TLA, nor the promoters of the TLC Investment Opportunity, have been registered with the Commission under Sections 35-1-810 *et seq.* and -410 *et seq.* of the Act. Thus, TLA, and Majors as its controlling person under Section 35-1-1500, have violated the registration requirements of Sections 35-1-810 *et seq.* of the Act and are subject to enforcement action by the Commission for such violations under Section 35-1-60 of the Act.

NOW, THEREFORE, IT IS ORDERED that Respondents Ned B. Majors and Tax Lien Agents, Inc. and every successor, affiliate, control person, director, agent, servant, or employee either of them, and every entity owned, operated, or indirectly or directly controlled or hereinafter organized by or on behalf of either of them immediately **CEASE AND DESIST** from offering or selling the TLC Investment Opportunity in or from the State of South Carolina.

IT IS FURTHER ORDERED that Respondents Ned B. Majors and Tax Lien Agents, Inc. and any successor, affiliate, control person, director, agent, servant, or employee of either of them, and every entity owned, operated, or indirectly or directly controlled or herein-

after organized by or on behalf of either of them **CEASE AND DESIST** from offering or selling any other investment opportunity involving an unregistered security in or from the State of South Carolina; and

IT IS FURTHER ORDERED that any exemption that Respondents Ned B. Majors and Tax Lien Agents, Inc. and any successor, affiliate, control person, director, agent, servant, or employee of either of them, and every entity owned, operated, or indirectly or directly controlled or hereinafter organized by or on behalf of either of them might be otherwise entitled to utilize, be and hereby is **REVOKED**, subject only to the limitations provided in Section 35-1-330 of the Act.

So **ORDERED** this 11th day of February, 2004.

By: /s/ Henry McMaster
Henry McMaster
South Carolina Securities Commissioner

APPENDIX E

[Filed Sept. 9, 2003]

STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
SECURITIES SECTION

IN THE MATTER OF:

Ned B. Majors and
Tax Lien Agents, Inc.

Respondents.

ADMINISTRATIVE PROCEEDING (FIRST)

ORDER TO CEASE AND DESIST SELLING UNREGISTERED SECURITIES AND ENGAGING IN SECURITIES FRAUD, AND NOTICE OF RIGHT TO A HEARING

Case No. 03010

The South Carolina Securities Section ("Section"), under the authority of the South Carolina Uniform Securities Act (the "Act"), §35-1-10, *et seq.*, Code of Laws of South Carolina, issues the following Order against Respondents for alleged violations of the Act, as set forth below, and notifies Respondent of their right to a hearing.

1. Ned B. Majors ("Majors") was at all times material herein both a person resident and doing business in South Carolina.

2. Majors' primary business and the business which forms the basis for this Order is accomplished through an entity known as "Tax Lien Agents" ("TLA").

3. TLA is a South Carolina corporation with its principal place of business in Myrtle Beach, South Carolina.

4. For service of process, the last known address for both Majors and TLA is 4052 Highway 17 Bypass South, Myrtle Beach, South Carolina 29588.

5. On or around January 27, 2003, the Section received a letter of compliant against Majors and TLA. The letter indicated:

   A. Respondent Majors, on behalf of himself and TLA, was conducting seminars at which Majors described the benefits of investigating in his and TLA's tax lien program;

   B. In connection with the seminars, a video tape explaining the process and benefits of investing in tax liens is played;

   C. At a seminar attended by a widowed cousin of complainant, the widow was promised an annual 8 to 24% annual return on money provided to Majors to purchase tax liens on her behalf;

   D. "Finders fees" were being paid in connection with the investment opportunity; and

   E. In connection with the investment opportunity, Majors makes reference to a book he indicates he has written on tax liens that is a bestseller, and yet complainant, a trader and seller of books, can find no such book.

6. An investigative file was opened and further information sought.

7. The Section's investigation revealed that solicitations were made through seminars, newspaper ads, and one or more web sites.

8. At the seminars, on tape and through the ads and written literature, Majors and TLA portray tax lien investments through them to be both safe and profitable.

9. Specific representations made by Majors to induce investment include:

   A. This is an investment plan that always works;

   B. This investment has a government guaranteed 8% to 25% A.P.R. with real expectations for a 10,000% yield;

   C. This is safer than any CD or any other investment;

   D. The investment is purchased in your name by your Individually Contracted Purchasing Agent, who never touches your money;

   E. All tax liens will be purchased and recorded by the government in your name and address only;

   F. Majors is the recognized authority on real estate tax liens, having written two books on tax lien investing, one in 1990 and another in 1999;

   G. Majors sold several hundred thousand books on tax liens, and one of his books on tax liens was a financial bestseller;

   H. Investment in tax liens offers safety, income, growth, liquidity, tax shelter, and convenience;

I. Tax Lien Certificates are a safe way to potentially acquire enormous wealth government guaranteed; and

J. "You're going to make more than a CD and this is safer than a CD."

10. Material facts Majors did not tell investors, prior to or at the time of investment include:

A. Upon Complaint, the Georgia Bar commenced an investigation of Majors, which resulted in an August 29, 2002 recommendation that he be disbarred, and on July 10, 2003, the Supreme Court of Georgia upheld the recommendation and disbarred Majors;

B. Majors previously owned and managed a business [Tax Lien Acquisitions ("TLAQ")] which was operated in the same manner as TLA, and TLAQ investor money was deposited in Majors' trust account, in violation of what he told investors when he induced them to invest;

C. TLAQ is now in bankruptcy;

D. Majors previously owned a computer company which declared bankruptcy;

E. Majors and TLA's investment produce has been the source of inquiries from state and federal securities regulators;

F. In February 2003, the Utah Division of Securities issued to Majors and TLA an Order To Show Cause why Majors and TLA should not be ordered to cease violating the Utah Securities Act and why they should not have to pay a fine for earlier violations;

G. Majors paid "commissions" to unregistered agents who recruited new investors; and

H. Majors did, in fact, deposit a significant number of investor checks into his attorney trust account, though such checks were marked payable to "The County Treasurer for Tax Liens."

11. Following solicitation by Majors, interested investors complete an "agency contract" and send checks to Majors and TLA.

12. The checks are titled as follows: one is for a non-refundable agency fee and is made out to Tax Lien Agents, Inc. and the second and any others are for investment and are made out to "County Treasurer for Tax Liens."

13. According to the terms of the agency contract, Majors and TLA are to search tax records, evaluate delinquent properties, and bid on and purchase such delinquent properties. In return for Majors' and TLA's efforts, the investor agrees to grant TLA a (post expense) 50% ownership interest in any purchased properties.

14. In the State of South Carolina, profit sharing agreements and investment contracts both constitute securities pursuant to South Carolina Code Section 35-1-20(15).

15. The investments offered by Majors and TLA are securities, in the form of participation in a profit sharing agreement and as investment contracts.

16. Registration records of the Section were searched for registrations of Ned Majors or Tax Lien Agents.

17. No agent or other type securities registration was located for Majors or TLA, and no issuer registra-

tion was located for either Majors, TLA or the investment opportunity offered by them.

18. During the period September 28, 1999 to at least June 23, 2003, Majors actively promoted, offered and sold the securities in and from the State of South Carolina.

19. The securities were not registered or exempt prior to sale.

20. Respondent Majors, acting on behalf of himself and TLA, in connection with the offer and sale of the securities above, made the following misrepresentation of fact:

    A. This is an investment plan that always works;

    B. This investment has a government guaranteed 8% to 25% A.P.R. with real expectations for a 10,000% yield;

    C. This is safer than any CD or any other investment;

    D. The investment is purchased in your name by your Individually Contracted Purchasing Agent, who never touches your money;

    E. All tax liens will be purchased and recorded by the government in your name and address only;

    F. Majors sold several hundred thousand books on tax liens, and one of his books on tax liens was a financial bestseller;

    G. Investment in tax liens offers safety, income, growth, liquidity, tax shelter, and convenience;

    H. Tax Lien Certificates are a safe way to potentially acquire enormous wealth government guaranteed; and

I. "You're going to make more than a CD and this is safer than a CD."

21. Respondent Majors, acting on behalf of himself and TLA, in connection with the offer and sale of the securities above, failed to inform investors of various material facts concerning their investments, including the facts that:

A. The investments were not registered for sale in or from this State;

B. An investment with Majors in tax liens carried with it a degree of risk of loss of some or all of the investor's funds;

C. Majors was not licensed to effect securities transactions in this State;

D. Majors and TLA did not hold and use investor's funds in the manner which they stated when they induced investment;

E. Majors often deposited investor checks addressed to the "County Treasurer for Tax Liens" into his attorney trust account;

F. Titles routinely were issued in the name of "Attorney Ned Majors Trust Account" instead of investor's names;

G. Investor money was not in an investment "safer than any CD or any other investment."

H. Upon complaint, the Georgia Bar commenced an investigation of Majors, which resulted in an August 29, 2002 recommendation that he be disbarred, and on July 10, 2003, the Supreme Court of Georgia upheld the recommendation and disbarred Majors;

I. Majors previously owned and managed a prior business [Tax Lien Acquisitions ("TLAQ")] which was operated in the same manner as TLA and that TLAQ investor money was deposited in Majors' trust account, in violation of what he told investors when he induced them to invest;

J. TLAQ is now in bankruptcy;

K. Majors previously owned a computer company which declared bankruptcy;

L. Majors and TLA's investment product has been the source of inquiries from state and federal securities regulators; and

M. In February 2003, the Utah Division of Securities issued to Majors and TLA an Order To Show Cause why Majors and TLA should not be ordered to cease violating the Utah Securities Act and why they should not have to pay a fine for earlier violations.

CONCLUSIONS OF LAW

22. The investment opportunity promoted, offered and sold by Majors and TLA constitutes a security, as that term is defined by §35-1-20(15) of the Act.

23. Pursuant to §35-1-810 of the Act, it is unlawful for any person to offer

for any person to offer or sell any security in this State unless (a) it is registered under this chapter, (b) the security or transaction is exempted under §35-1-310 or 35-1-320, or (c) it is a federal covered security.

24. The investment opportunity promoted, offered and sold by Respondents Majors and TLA was not properly registered with the State of South Carolina prior to its offer and sale in and from this State.

25. Pursuant to §35-1-340 of the Act, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

26. Previously Respondents Majors and TLA have indicated they believe the offerings to be exempt transactions pursuant to Section 35-1-320(5) of the Act, which exempts from registration "any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit."

27. The Section does not find the security, as offered and sold, falls within the limited exemption provided in Section 35-1-320(5).

28. Majors and TLA have produced no evidence to meet a burden of proof requiring them to show the securities they offered and sold were exempt securities as defined by §35-1-310 of the Act.

29. Thus, it is the finding of the Section that Respondents Majors and TLA have produced no evidence to meet a burden of proof requiring them to show the securities were exempt transactions under §35-1-320 of the Act.

30. Respondents Majors and TLA have produced no evidence to establish the securities offered and sold by

Respondents were federal covered securities as defined by §35-1-20(5) of the Act.

31. When Respondents Majors and TLA offered and sold the aforementioned unregistered securities in and from the State of South Carolina, they did so in violation of the securities registration provisions of the Act.

32. When Respondent TLA allowed its agent, Ned Majors, to offer and sell the securities from the State of South Carolina, it did so in violation of the agent registration provisions of the Act.

33. Respondents Majors and TLA, in connection with the offer and sale of the securities above, made material omissions and also made materially misleading statements to investors.

34. When Respondents Majors and TLA made the material omissions and materially misleading statements, they violated Section 35-1-1210 of the Act, and committed securities fraud.

WHEREAS, the investments offered by Majors and TLA and described above constitute securities within the meaning of Section 35-1-20(15) of the Act; and

WHEREAS, the records of the Section disclose that the securities are not now, nor have they ever been, registered under the Act; and

WHEREAS, Respondent Majors acted both individually and as an agent of TLA within the meaning of Section 35-1-20(2) of the Act; and

WHEREAS, the records of the Section show no agent registration for Respondent Majors in South Carolina; and

WHEREAS, the records of the Section show no registration for any issuer titled "Tax Lien Agents"; and

WHEREAS, based on the foregoing, the Section finds that Respondents Majors and TLA have engaged in acts or practices which violate Sections 35-1-410 and 35-1-810 of the Act; and

WHEREAS the Section further finds that Respondents Majors and TLA, in connection with the offer and sale of the securities above in and from the State of South Carolina, both misstated material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in violation of Section 35-1-1210 of the Act;

NOW, THEREFORE, IT IS ORDERED that Respondents Ned B. Majors and Tax Lien Agents, and every successor, affiliate, control person, agent, servant, or employee of either of them, and every entity owned, operated, or indirectly or directly controlled or hereinafter organized by or on behalf of either of them immediately CEASE AND DESIST from offering or selling securities in or from the State of South Carolina and from otherwise violating the Act, and in particular, Sections 35-1-410, 35-1-810 and 35-1-1210, thereof.

IT IS FURTHER ORDERED that any exemption that Respondents Ned B. Majors and Tax Lien Agents, or any successor, affiliate, control person, agent, servant, or employee of either of them, and every entity owned, operated, or indirectly or directly controlled or hereinafter organized by or on behalf of either of them might otherwise be entitled to utilize, be and hereby is REVOKED, subject only to the limitations provided in Section 35-1-330 of the Act.

Within thirty (30) days after receipt of written notification that this Order has been issued, Respondents may request that a hearing be held to consider rescinding the Order. To schedule such a hearing, Respondents must file a written request with the Securities Section, Post Office Box 11549, Columbia, South Carolina, 29211-1549.

The written request for a hearing should include, at a minimum, a statement of the specific reasons, including facts and provisions of the Act upon which the requesting Respondent is relying, that support the request to consider rescinding the Order.

ENGAGING IN ACTS PROHIBITED BY THIS ORDER MAY RESULT IN ADDITIONAL ADMINISTRATIVE ACTIONS AND/OR FINES. A WILLFUL VIOLATION OF THIS ORDER MAY RESULT IN A REFERRAL TO APPROPRIATE AUTHORITIES FOR POSSIBLE CRIMINAL PROSECUTION.

So ORDERED this 9th day of September, 2003.

By: /s/ Henry McMaster
Henry McMaster
Securities Commissioner

By: /s/ Tracy A. Meyers
Tracy A. Meyers
Assistant Attorney General
Securities Section
Post Office Box 11549
Columbia, S. C. 29211
(803) 734-4731

APPENDIX F

[Filed Oct. 27, 2004]

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
(NON-JURY)

Case No. 04-CP-26-874

Ned B. Majors and
Tax Lien Agents, Inc.

Petitioners

vs.

South Carolina Securities Commission

Respondent

ORDER

Ned B. Majors and Tax Lien Agents, Inc. (the "Appellants") filed a Petition for Judicial Review on February 19, 2004, requesting that this Court vacate and/or reverse the *Final Order to Cease and Desist Selling Unregistered Securities* (the "Final Order"), which was issued by the South Carolina Securities Commissioner (the "Commissioner") on February 11, 2004 in South Carolina Securities Commission ("Commission") Case No. 03010. Pursuant to Section 35-1-1310 of the South Carolina

Uniform Securities Act, S.C. Code Ann. §35-1-10, *et. seq.* (the "Act"), this Court has exclusive jurisdiction to affirm, modify, enforce, or set aside the Final Order, in whole or in part.

The three issues before this Court are as follows: (1) whether the Commissioner lacked the statutory authority to initiate this proceeding as he did: by means of his ex parte *Order to Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud, and Notice of Right to a Hearing* (the "Initial Ex parte Order") and then conduct the case through the internal proceeding that he utilized; (2) if the Commissioner possessed the appropriate authority, whether he employed a structure in initiating and conducting the underlying administrative proceeding that violated Appellants' right to due process afforded by Article 1, Sections 3 and 22 of the *South Carolina Constitution*; and (3) if the Commissioner afforded due process to Appellants, whether the Commissioner erred in finding that the Appellants' business arrangement that was in existence prior to issuance of the Initial Ex parte Order was a "security" pursuant to the Act.

The South Carolina Securities Commission had authority under the Act to proceed against the Appellants by issuing a cease and desist order. Section 35-1-60 of the Act states in pertinent part: "The securities commissioner may make, amend, and rescind those rules, forms, and orders, including cease and desist orders, as are necessary to carry out the provisions of [the Act]."

After a careful consideration of Article I, Section 22, of the South Carolina Constitution, *Garris v. Governing Board of the S.C. Reins. Fac.*, 333 S.C. 432, 511 S.E.2d 48 (1998); *Ross v. Medical University of South Carolina*, 328 S.C. 51, 592 S.E. 2d 62 (1997), and *Withrow v.*

Larkin, 421 U.S. 35, 95 S.Ct. 1456 (1975), this Court finds that the subject process was flawed because the Securities Commissioner issued the Initial Ex parte Order with detailed and substantive findings of fact and conclusions of law, when, pursuant to statutory mandate, he also issued the Final Cease and Desist Order. The Court finds that the Securities Commission should not have issued the Initial Ex parte Order with its findings of fact and conclusions of law, including those related to the Commission's basic jurisdiction, particularly when the Act sets forth a process for initiating the same proceeding through a rule to show cause.

The Court rules, however, that the error was harmless, since the Commissioner's conclusion that the subject activity was a security would have been the same even if the Commissioner had initiated the proceeding by issuing a rule to show cause. *Ross,* 328 S.C. 51, 70, 492 S.E. 2d 61, 72-73.

The Court is mindful that the *Garris* court, in overturning the administrative ruling at issue there on due process grounds, declined to employ a harmless error analysis because the subject process was "so inherently flawed that it is not subject to harmless error analysis." *Garris,* 333 S.C. 432, 447-448, 511 S.E.2d 48, 56. The Court distinguishes the present case from that part of the *Garris* holding, because the procedure employed by the Securities Commissioner here was not so inherently flawed as to preclude the application of a harmless error analysis.

The business arrangement at issue here is discussed at length in the Final Order, and evidenced by the "Agency Contract" attached hereto as Exhibit A. The Court finds that this arrangement is a security because it is an "in-

vestment contract" under Section 35-1-20(15) of the Act. The arrangement satisfies all three elements of the analysis set forth in *SEC v. W. J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100 (1946), for an investment contract because it is: (i) an investment of money under *SEC v. Pinckney*, 923 F. Supp. 76, 80 (E.D.N.C. 1996) ("*Pinckney*"), (ii) in a common enterprise under the strict vertical commonality test set forth in *Pinckney*, (iii) for which the Appellants' principals expect profit to be derived from the efforts of the Appellants under *Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), *rev'd on other grounds, Waterman v. Alta Verde Indus., Inc.*, 643 F. Supp. 797 (E.D.N.C. 1986), and *SEC v. R.G. Reynolds Enter., Inc.*, 952 F.2d 1125 (9th Cir. 1991). This Court hereby adopts the reasoning and language of the Final Order as to why the subject business arrangement is a security and incorporates the relevant portions of the Final Order herein by reference (a copy of the Final Order is attached as Exhibit B).

The Court notes that on March 9, 2004 Judge Cottingham issued an order staying enforcement of the Commissioner's underlying Orders in this proceeding "until such time as this appeal is finally concluded." Judge Cottingham based his decision to issue the Stay in part upon his finding that the Commission was unable to cite any instance of customer dissatisfaction. The Court hereby delays the effectiveness of the present Order for forty-five days from its date of entry, to provide the parties an opportunity to seek any necessary extension of the existing Stay in conjunction with any further appeal of this matter.

THEREFORE, for the reasons set forth above, this Court affirms the Final Order to the extent set forth herein. IT IS SO ORDERED.

/s/ James E. Lockemy
The Honorable James E. Lockemy
Circuit Court Judge

October 27, 2004
Myrtle Beach, South Carolina

EXHIBIT A

AGENCY CONTRACT

[Printed herein at pp. 57a-62a]

APPENDIX G

NEXSEN PRUET JACOBS & POLLARD, LLC
Attorneys and Counselors at Law

1441 Main Street, Suite 1500, Columbia, SC 29201
803-771-8900

November 4, 2003

John F. Beach, Esquire
Ellis Lawhorne & Sims
PO Box 2285 (29202)
1321 Lady Street
Columbia, SC 29211

Tracy A. Meyers, Esquire
Deputy Securities Commissioner
Securities Division
Rembert C. Dennis Office Building
1000 Assembly Street
Columbia, South Carolina 29201

RE: South Carolina Securities Commission/In Re: Ned B. Majors and Tax Lien Agents, Inc.

Dear John and Tracy:

Based upon my meeting today with Attorney General McMaster, I have been instructed to deliver my report to him without providing a copy to either of you. Attorney General McMaster will then determine when to deliver a copy of my repor to each of you, either promptly after his receipt or immediately upon the issuance of his final order. In either case, you will both receive a copy of my report, the only question being the timing. Attorney General McMaster has not yet determined the timing

of the release of my report to you, and is taking a look at the law and the precedential value of his decision in this regard.

Should either of you wish to present an argument for or against release of my report at one time or the other, Attorney General McMaster will welcome a letter or brief from you citing to any appropriate law or other legal authorities. I look forward to receiving your briefs on the 14th and your reply briefs on the 19th.

Sincerely yours,
/s/ G. Marcus Knight
G. Marcus Knight
Hearing Officer

cc: Attorney General Henry McMaster

APPENDIX H

Code 1976 §35 1-1480

CODE OF LAWS OF SOUTH CAROLINA
1976 ANNOTATED
TITLE 35. SECURITIES
CHAPTER 1. UNIFORM
SECURITIES ACT
ARTICLE 13, ENFORCEMENT,
REMEDIES, LIABILITIES AND
PENALTIES

Current through End of 2003 Reg. Sess.

§ 35-1-1480. Power of securities commissioner to apply for injunction, mandamus or receiver.

Whenever it appears to the securities commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order hereunder, he may in his discretion bring an action in the court of common pleas for Richland County or in the county wherein such person resides to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court may not require the securities commissioner to post a bond.

HISTORY: 1962 Code §63-308; 1961 (52) 185.

HISTORY: Amended in 1997 Act No. 134, §1, eff June 13, 1997.

APPENDIX I

Code 1976 §35-1-330

CODE OF LAWS OF SOUTH CAROLINA
1976 ANNOTATED
TITLE 35. SECURITIES
CHAPTER 1. UNIFORM SECURITIES ACT
ARTICLE 3, EXEMPT SECURITIES AND TRANSACTIONS

Current through End of 2003 Reg. Sess.

§ 35-1-330. Denial or revocation of certain exemptions; notice; hearings; summary orders.

The securities commissioner may by order deny or revoke any exemption specified in item (8) or (10) of Section 35-1-310 or in Section 35-1-320 with respect to a specific security or transaction. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing and written findings of fact and conclusions of law, except that the securities commissioner may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceeding under this section. Upon the entry of a summary order, the securities commissioner shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within fifteen days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the securities commissioner, the order will remain in effect until it is modified or vacated by the securities commissioner. If a hearing is requested or ordered, the securities commissioner, after

notice of an opportunity for hearing to all interested persons, may modify or vacate the order or extend it until final determination. No order under this section may operate retroactively. No person may be considered to have violated Section 35-1-50 or Section 35-1-810 by reason of any offer or sale effected after the entry of an order under this section if he sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order.

HISTORY: 1962 Code §62-53; 1961 (52) 185.

HISTORY: Amended by 1997 Act No. 134, §1, eff June 13, 1997.

APPENDIX J

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, member of the jury venire or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

* * *

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. The South Carolina version of paragraph (a) differs from the Model Rule in its reference to a "member of the jury venire" rather than "prospective juror" since any person technically could be the latter.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceedings such as judges, masters or jurors, unless authorized to do so by law or court order.

APPENDIX K

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

COURT OF COMMON PLEAS
04-CP-26-874

NED B. MAJORS AND TAX LIEN AGENTS, INCORPORATED

-VS-

S.C. SECURITIES COMMISSION

TRANSCRIPT OF RECORD

September 7, 2004
LEXINGTON, SOUTH CAROLINA

BEFORE:
THE HONORABLE JAMES E. LOCKEMY, JUDGE.

APPEARANCES:
JOHN F. BEACH, ESQUIRE
JOHN J. PRINGLE, JR., ESQUIRE
ATTORNEYS FOR THE PLAINTIFFS

SCOTT E. HULTSTRAND, ESQUIRE
TRACY A. MEYERS, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

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[53] WHAT YOU LOOK FOR IN A HARMLESS ANALYSIS IS WHAT THE FINAL RESULT IS. IS THE FINAL RESULT DIFFERENT WHEN YOU COMPARE IT FROM AN INDEPENDENT ADJUDICATOR AND THE ADJUDICATOR THAT ACTUALLY ADJUDICATED IT?

IN THIS CASE WE DON'T HAVE TO HAVE AN IMAGINARY INDEPENDENT ADJUDICATOR BECAUSE WE HAVE THE HEARING OFFICER WHO CONCLUDED AT THE END AFTER LOOKING AT ALL THE EVIDENCE HIMSELF THAT IT WAS A SECURITY AND THAT A CEASE AND DESIST WAS APPROPRIATE. ESSENTIALLY ALL THE SECURITIES COMMISSIONER DID IS FIND THE EXACT SAME THING THAT THE HEARING OFFICER DID: IT WAS A SECURITY AND THAT A CEASE AND DESIST ORDER WAS APPROPRIATE.

SO I THINK THAT HARMLESS ERROR CERTAINLY IN THAT ANALYSIS WOULD APPLY TO THIS CASE, THAT EVEN IF YOU DID FIND A DEFECT IN THE FIRST PART THAT IT IS NOT DEFECTIVE ALL THE WAY TO THE END AND THAT IT WOULD STILL BE AN APPROPRIATE FINAL CEASE AND DESIST ORDER.

THE COURT: OKAY. ALL RIGHT. LET ME GO AHEAD AND – OKAY. ANYTHING ELSE FROM ANYONE? OKAY. I AM GOING TO AFFIRM THE DECISION OF THE SECURITIES COMMISSIONER. HOWEVER, ONE THING I WANT TO ADD TO IT IS THAT I DO FIND AND FEEL THAT THE PROCESS WAS FLAWED IN ISSUING THE CEASE AND DESIST WITH FINDINGS AND CONCLUSIONS OF LAW AND THAT IT IS MY THOUGHTS THAT IF – I'M SURE THIS IS GOING UP, SO WHATEVER I SAY

REALLY IS GOING TO MAKE VERY LITTLE DIFFERENCE. SOME [54] APPELLATE COURT IS GOING TO MAKE THEIR DETERMINATION OF IT, BUT I DO FEEL THAT IF FOR SOME STRANGE REASON THIS DOESN'T GO ANY FURTHER IT'S MY THOUGHT THAT IF A METHOD LIKE THIS IS EMPLOYED AGAIN AFTER IN MY THOUGHTS THAT IT'S IMPROPER THAT THIS COURT – THAT THE COURT SHOULD TAKE A STRONG VIEW ABOUT THE ACTIVITY.

I JUST FEEL THAT THERE SHOULD NOT BE CEASE AND DESIST OR FINDINGS AND CONCLUSIONS OF LAW ABOUT WHETHER AN AGENCY HAS JURISDICTION OF SOMETHING IF THE STATUTE, AS IT DOES HERE, SETS OUT A PROCESS FOR DOING IT WHEN IT COULD HAVE BEEN DONE BY A RULE TO SHOW CAUSE AND I FEEL THAT SHOULD HAVE BEEN DONE. HOWEVER, LOOKING AT WHAT WAS DETERMINED BY THE INDEPENDENT HEARING OFFICER, LOOKING AT THE ENTIRE TOTALITY OF ALL THE ACTIVITY AND FACTS HERE AND THE LAW AS I VIEW IT FROM MY REVIEW OF THE VARIOUS BRIEFS SUBMITTED, I FIND THAT IT – THAT THIS IS AN ACTIVITY THAT SHOULD BE REGULATED UNDER THE LAW BY THE SECURITIES COMMISSIONER.

SO ALTHOUGH I FIND THE PROCESS ITSELF FLAWED, I'M NOT SO SURE I GO TO A VIOLATION OF DUE PROCESS UNDER ARTICLE ONE, SECTION 22, AS MUCH AS I FIND IT'S JUST IMPROPER FOR THE DECISION TO HAVE BEEN MADE AND THEN ASK FOR – AND THEN AFTER THAT HAVE THE HEARING AND I THINK THAT IT WOULD HAVE BEEN BETTER TO HAVE AN ISSUE

BY THE – AN ISSUANCE BY THE COMMISSIONER THAT – THAT HE IS CONCERNED ABOUT THIS PROCESS OR HAS ENOUGH EVIDENCE THAT IT SHOULD BE REGULATED UNLESS THE

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APPENDIX L

[SEAL]

SECRETARY OF STATE
Business Services and Regulation
#2 Martin Luther King, Jr., Dr., S.E.
Suite 315, West Tower
Atlanta, Georgia 30334

Max Leland
Secretary of State

James F. Gullion
Director
(404) 856-6478

November 24, 1995

Mr. George A. Crawford, Esq.
Senior Trial Counsel
Department of Corporations
2700 Wilshire Boulevard
Los Angeles, California 90010-3001

RE: Tax Lien Acquisitions, Inc.
Your File Alpha

Dear Mr. Crawford:

This letter is being sent in reply to our telephone conversation and subsequent written request from you dated November 14, 1995. This office and the Atlanta office of the Securities and Exchange Commission conducted an investigation into the business activities of Tax Lien Acquisitions, Inc., in 1989. Based on the examination of records and interviews with the principals of that company, no action was taken with respect to the business plan. It appeared that Mr. Majors

and Ms. Featherly were engaged in activities that would come under the jurisdiction of Georgia's real estate provisions.

This office further understands that the SEC inquiry resulted in "no action". This office has received no complaints from customers of Tax Lien Acquisition. Should you have any further questions, please do not hesitate to contact me.

Sincerely,

/s/ Thom R. Coulter
Thom R. Coulter
Investigator